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No. 99-

IN THE
Supreme Court of the United States

EDWARD J. SHOEN, *et al.*,
Petitioners,

v.

SAMUEL W. SHOEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Bankruptcy Code, creditors are not entitled to interest on unsecured claims accruing after the filing of a bankruptcy petition. 11 U.S.C. § 502(b)(2).

The question presented is whether the Ninth Circuit erred in holding—contrary to Section 502(b)(2) and in conflict with the decisions of this Court and other appellate and bankruptcy courts—that respondents were entitled to more than $55 million in postpetition interest on an unsecured state court money judgment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Edward J. ("Joe") Shoen, James P. Shoen, Aubrey K. Johnson, John M. Dodds, William E. Carty, and AMERCO were the Appellants/Cross-Appellees before the Ninth Circuit and the Bankruptcy Appellate Panel ("BAP").

Respondents Samuel W. Shoen, Cecilia M. Hanlon (a/k/a Cecilia M. Shoen-Hanlon), Katrina Carlson (a/k/a Katrina Shoen-Carlson), Michael Shoen, Samwill, Inc. (now called Katabasis International, Inc.), Cemar, Inc., Kattydid, Inc., and Mickl, Inc., were the Appellees/Cross-Appellants before the Ninth Circuit and the BAP.

Petitioner AMERCO has no parent corporations, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Edward J. ("Joe") Shoen, James P. Shoen, Aubrey K. Johnson, John M. Dodds, William E. Carty, and AMERCO respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 176 F.3d 1150 and reprinted in the appendix hereto ("App.") at 1a. The Bankruptcy Appellate Panel of the Ninth Circuit ("BAP") did not publish its opinion, but the Ninth Circuit attached the BAP's opinion as an appendix to its own published opinion. The BAP's opinion appears here at App. 14a. The relevant oral ruling and order of the United States Bankruptcy

Court for the District of Arizona are unpublished and reprinted at App. 39a and App. 42a, respectively.

JURISDICTION

The judgment of the Ninth Circuit was entered on May 6, 1999. App. 1a. The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing en banc on June 18, 1999. App. 37a. On September 2, 1999, Justice O'Connor extended the time to petition for certiorari to and including October 18, 1999. App. 47a. The jurisdiction of the Ninth Circuit was based on 28 U.S.C. § 158(d). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Bankruptcy Code, 11 U.S.C. § 502(b), provides that if a creditor files a claim "the court * * * shall determine the amount of such claim * * * as of the date of the filing of the petition, and shall allow such claim * * * except to the extent that— * * * (2) such claim is for unmatured interest." The provisions of 11 U.S.C. § 502 are reproduced in full at App. 48a.

INTRODUCTION

In this case, a panel of the Ninth Circuit, over a strong dissent, "creat[ed] an unprecedented exception" to one of the cornerstones of American bankruptcy law: the rule in 11 U.S.C. § 502(b)(2) disallowing postpetition interest on unsecured claims. App. 7a (McKeown, J., dissenting).

Petitioners declared bankruptcy the same day an Arizona state court entered a judgment awarding respondents nearly $462 million in damages on their claim that petitioners had breached their fiduciary duties as corporate officers of petitioner AMERCO and thereby rendered re-

spondents' AMERCO stock worthless. Despite the well-established bankruptcy rule barring postpetition interest on unsecured claims, the Ninth Circuit held that respondents were entitled to collect more than $55 million in postjudgment interest on the unsecured state court judgment. The court so held on the ground that the state court judgment required petitioners to pay such interest as a condition to their right to take possession of respondents' stock in AMERCO.

The Ninth Circuit's decision to permit respondents to receive postpetition interest in the face of the plain language of Section 502(b)(2) does violence to a core provision of the Bankruptcy Code. The Bankruptcy Code contains but a few legislatively defined exceptions to the general rule disallowing postpetition interest on unsecured claims. The unsecured state court judgment at issue here falls within none of these exceptions. The Ninth Circuit's decision to create another exception conflicts with the decisions of this Court and other circuit and bankruptcy courts. Review of the decision below by this Court is necessary to resolve these conflicts and restore uniformity to the law of bankruptcy by reversing the Ninth Circuit's erroneous decision.

STATEMENT OF THE CASE

The Struggle Over AMERCO. Petitioner AMERCO, the parent company of U-Haul International, Inc., is primarily owned by certain members of the Shoen family. The important question of bankruptcy law presented in this case arises out of a struggle within the Shoen family in the mid-1980s over the control of AMERCO. In 1986, Leonard Shoen, the founder of U-Haul, left the management of AMERCO and, along with several other family members, subsequently attempted a hostile takeover of the company. A group of AMERCO directors led by Edward

J. ("Joe") Shoen, however, managed to block the takeover attempt by having additional AMERCO stock issued and adopting a "poison pill" strategy. App. 15a-16a.

The State Court Litigation. In 1988, certain members of Leonard Shoen's faction sued several of those who had sided with Joe Shoen in Arizona state court. The plaintiffs alleged that the defendants had breached their fiduciary duties as directors of AMERCO and sought money damages. The theory of the plaintiffs' case was that the defendants' actions had rendered their AMERCO stock worthless. Prior to trial, the Arizona court ruled that if the plaintiffs were to recover damages on this "worthless stock" theory *and* retain their stock in AMERCO, they would receive an impermissible double recovery. Accordingly, the court ruled that the plaintiffs could not both accept a money judgment on their claims and keep their AMERCO stock.[1] Faced with this choice, the plaintiffs elected to proceed to trial, accept whatever damages the jury awarded, and surrender their stock. App. 7a, 16a-17a.

In October 1994, the jury returned a verdict in favor of the plaintiffs and awarded them $1.48 billion in compensatory damages against all defendants and an additional $70 million in punitive damages against Joe Shoen. The court found, however, that the jury's verdict as to damages was based on an inflated valuation of the company and issued a remittitur requiring the plaintiffs to accept $461,838,000 in compensatory damages and $7 million in punitive damages or face a new trial on damages. The plaintiffs accepted the remittitur on February 14, 1995. App. 7a-8a, 17a.

On February 21, 1995, the court entered a judgment awarding the plaintiffs $461,838,000 in compensatory

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[1] The propriety of the state court's ruling was not challenged below and is not at issue here. App. 7a n.3, 24a.

damages. The judgment also required the plaintiffs to transfer all their AMERCO stock to the defendants upon payment of these damages.[2] Finally, the judgment awarded the plaintiffs interest at the Arizona statutory rate of 10% per annum. App. 8a, 17a.[3]

The Bankruptcy Proceedings. On the same day the court entered judgment, petitioners Joe Shoen, James P. Shoen, Aubrey K. Johnson, John M. Dodds, and William E. Carty, all of whom were defendants in the state court action, filed chapter 11 bankruptcy petitions, which the Bankruptcy Court ordered jointly administered. Respondents—each of whom had been a plaintiff in the state court case—filed claims as judgment creditors. App. 18a.[4]

Although the Bankruptcy Court denied confirmation of the plans of reorganization initially proposed by petition-

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[2] This part of the judgment read: "Upon payment or tender of the total dollar amount set forth above, together with accrued interest and taxable costs, all Plaintiffs' shares of AMERCO Common Stock identified above shall be transferred to Defendants or their designees." App. 25a.

[3] The judgment read: "Plaintiffs are hereby awarded interest on the amount of this Judgment ($461,838,000) at the rate of ten percent (10%) per annum until paid, said interest to accrue from February 14, 1995." App. 25a.

[4] Although the Ninth Circuit—with no basis in the record—opined that petitioners "filed bankruptcy and sought to use the protections afforded by those proceedings in order to pay something other than the amount decreed by the Arizona Superior Court," App. 3a, the Bankruptcy Court specifically found that the petitions were filed in good faith. The Bankruptcy Court found that "[t]here is no evidence that the bankruptcies were filed with malice or ill-will" and noted that "[a]t the time these cases were commenced, these Debtors were faced with a staggering $461 million debt, which they could not possibly pay from their personal resources." *In re Shoen*, 193 B.R. 302, 312-313 (Bankr. D. Ariz. 1996). *See also* App. 6a ("This is not a case, as the Majority suggests, where one party has sought in bad faith to use bankruptcy proceedings in order to escape its rightful creditors and obtain a 'free lunch.'") (McKeown, J., dissenting).

ers, *see In re Shoen*, 193 B.R. 302 (Bankr. D. Ariz. 1996), petitioners and respondents subsequently reached a settlement that led to consensual modifications to the plans of reorganization. The Bankruptcy Court confirmed the plans as modified on March 15, 1996, and its confirmation order was not appealed. App. 18a-20a.

The confirmed plans called for AMERCO to pay respondents the entire $461,838,000 awarded by the state court in cash.[5] The confirmed plans also called for respondents to transfer their stock to AMERCO. The confirmed plans did not, however, provide for respondents to receive postpetition interest on the judgment amount.[6] Instead, petitioners and respondents agreed to have the Bankruptcy Court decide whether respondents were entitled to such interest and, if so, in what amount. Accordingly, the confirmed plans provided for the creation of an interest-bearing escrow account into which would be deposited any postpetition interest the court determined to be owing. App. 20a-21a.

At a hearing held on July 19, 1996, the Bankruptcy Court ruled from the bench that respondents (who it referred to as the "Share Case Plaintiffs") were entitled to postpetition interest on the state court judgment. The Bankruptcy Court said that "since the debtors' plan[s] compel the Share Case Plaintiffs to surrender their AMERCO common stock pursuant to the Share Case Judgment, then the defendants must comply with that judgment and pay the interest." App. 40a. Thus, in the

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[5] Respondents have already been paid this amount in full.

[6] Because petitioners filed for bankruptcy on February 21, 1995—the same day the judgment was entered—all of the interest at issue here is both postjudgment and postpetition. The court's award of prejudgment interest between February 14, 1995—the day respondents accepted the remittitur—and February 21, 1995, is not in dispute.

Bankruptcy Court's view, petitioners were required to pay postpetition interest on the state court judgment because "[t]his is what the Maricopa County Share Case Judgment requires as a condition of forcing others to part with their property." App. 40a. The court added that "the debtors cannot have it both ways. They cannot, as a matter of law, pay less to acquire another's property than the amount set forth in * * * the Share Case Judgment of the Maricopa County Superior Court." App. 41a. The Bankruptcy Court subsequently entered an order stating that petitioners "shall be, and hereby are, determined to be obligated to pay Post-Petition Date Interest on" the state court judgment at the Arizona 10% judgment interest rate. App. 44a. Petitioners promptly deposited more than $55 million into the escrow account. App. 22a.

The BAP Decision. The Bankruptcy Appellate Panel of the Ninth Circuit ("BAP") affirmed. It held that petitioners "are required to pay postpetition interest to satisfy the stock surrender provision of the Arizona state court judgment." App. 36a.

Finding that the state court judgment was properly characterized as "a judicially mandated sale of stock," the BAP saw the question before it as whether respondents' claim to "postpetition interest on the state court judgment was an enforceable condition of the stock surrender provision in that judgment." App. 23a. The BAP held that it was. The BAP reasoned that "although interest accruing on a postpetition, unsecured debt is generally disallowed in bankruptcy under § 502(b)(2), the continued accrual of interest is nevertheless a condition for the acquisition of the stock. As such, postpetition interest was required in order to satisfy the terms of the judgment." App. 25a-26a. In sum, as the BAP saw it, "[t]he terms set forth in the state court judgment as a condition

for the stock transfer required payment of interest at 10 percent." App. 27a.

The Ninth Circuit Decision. A divided panel of the Ninth Circuit affirmed the BAP's decision. In a *per curiam* opinion joined by Circuit Judge Fernandez and District Judge Weiner, the panel agreed with the BAP that respondents were entitled to postpetition interest. The panel did so "for the reasons articulated by the BAP which we adopt" and attached the BAP's opinion as an appendix to its own opinion. App. 3a. Thus, the BAP's opinion is now Ninth Circuit law.

In addition to adopting the BAP's opinion, the panel also offered "a few reflections" of its own. App. 3a. The panel said that the BAP had properly "dubbed the [state court] judgment 'a judicially prescribed sale of stock.' " App. 4a. And it accepted the BAP's explanation that respondents (who it called the "Samuel Shoen Interests") were entitled to postpetition interest because the judgment's stock transfer provision was conditioned on petitioners' (the "Edward Shoen Interests") payment of such interest:

> Call it what you like, but the Edward Shoen Interests had no right whatever to obtain the property of the Samuel Shoen Interests until they complied with the terms of the Arizona judgment. That the bankruptcy court required them to do just that violates neither the policies, the purposes, nor the letter of the bankruptcy law. In short, the Edward Shoen Interests could not obtain transfer of the stock of the Samuel Shoen Interests without paying the full price, which included all of the interest. [App. 4a.]

The Dissent. Judge McKeown dissented. She said that "I find no magic in the nature of the Arizona judgment that removes it from the general rule disallowing postpetition interest on unsecured claims." App. 5a. And

she took the panel to task for "tak[ing] a straightforward state court judgment for damages and transform[ing] it into a 'judicially prescribed sale of stock' that is impervious to the operation of federal bankruptcy law." App. 6a.

Unlike the panel, Judge McKeown concluded that the award of postpetition interest was clearly barred by Section 502(b)(2). As she explained:

> The rule is clear: the Bankruptcy Code prohibits postpetition interest on unsecured claims. 11 U.S.C. § 502(b)(2). The Arizona judgment is an unsecured claim. The interest accrued on the judgment after the filing of the bankruptcy is postpetition interest. What then is the majority's basis for deviating from the rule? None, other than creating an unprecedented exception to the rule. [App. 6a-7a (footnotes omitted).]

Judge McKeown also rejected the conclusion of the panel and the BAP that respondents were entitled to postpetition interest because such interest was a condition of the stock transfer, saying that "this ignores the intervention of the bankruptcy filing" and fails "to accord due deference" to the Bankruptcy Code. App. 8a-9a, 10a. She explained that

> the well established principle [is] that a creditor's state law rights are subordinate to the operation of federal bankruptcy law. Whereas prepetition interest is governed by state law, the Supreme Court reminds us that entitlement to postpetition interest "has long been decided by federal law." The majority reads the terms of a state court judgment as trumping federal bankruptcy law—this is the tail wagging the dog. [App. 11a (quoting *Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 163 (1946); citations omitted).]

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S DECISION IS CONTRARY TO THE BANKRUPTCY CODE AND CONFLICTS WITH THE DECISIONS OF THIS COURT AND NUMEROUS OTHER APPELLATE AND BANKRUPTCY COURTS.

1. It is a cornerstone of our bankruptcy law that creditors may not receive postpetition interest on unsecured claims. *See* 11 U.S.C. § 502(b)(2); *United Savings Ass'n of Texas* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 373 (1988) (citing Section 502 (b)(2) for "the general rule disallowing postpetition interest"); 4 *Collier on Bankruptcy* ¶ 502.03[3][a] (15th ed. rev. 1999) ("section 502(b)(2) prohibits payment of postpetition interest on prepetition unsecured claims"). This rule developed nearly two centuries ago as part of the English bankruptcy system, and became a well-established rule of American bankruptcy law long before the enactment of the Bankruptcy Code in 1978. *See United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 246 (1989) (noting the "pre-Code rule that the running of interest ceased when a bankruptcy petition was filed"); *Nicholas* v. *United States*, 384 U.S. 678, 682 (1966) ("It is a well-settled principle of American bankruptcy law that in cases of ordinary bankruptcy, the accumulation of interest on claims against a bankrupt estate is suspended as of the date the petition in bankruptcy is filed."); *Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 163 (1946) ("The general rule in bankruptcy * * * has been that interest on the debtor's obligations ceases to accrue at the beginning of proceedings."). In *Sexton* v. *Dreyfus*, 219 U.S. 339 (1911), Justice Holmes said that "the rule was laid down not because of

the words of [a] statute, but as a *fundamental principle*." *Id.* at 344 (emphasis added).[7]

There are several justifications for the rule. First, the rule promotes certainty and eases administration of the bankrupt's estate by "fix[ing] the moment when the affairs of the bankrupt are supposed to be wound up." *Id.* Second, it was thought that allowing interest to accrue postpetition would be "in the nature of a penalty imposed because of delay in prompt payment—delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved." *Vanston Bondholders*, 329 U.S. at 163. Third, the rule assures that different creditors who have claims carrying different interest rates or are paid by the bankruptcy court on different dates "suffer neither gain nor loss caused solely by delay." *Id.* at 164.

This fundamental principle was codified as part of the Bankruptcy Code. Section 502(b) instructs bankruptcy courts to determine the amount of a claim "as of the date of the filing of the petition"—thus excluding any interest accruing *after* the petition date. And Section 502(b)(2) provides that a claim shall be disallowed to the extent it is for "unmatured interest."[8] "Thus, these two provisions

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[7] "For more than a century and a half the theory of the English bankrupt system has been that everything stops at a certain date. Interest was not computed beyond the date of the commission. This rule was applied to mortgages as well as to unsecured debts * * *. We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system." *Sexton*, 219 U.S. at 344 (Holmes, J.) (citations omitted).

[8] Although the Code does not define the term "unmatured interest," its legislative history indicates that "[i]nterest disallowed under this paragraph includes postpetition interest that is not yet due and payable" and that "interest stops accruing at the date of the filing of the petition." H.R. Rep. No. 595, 95th Cong., 1st Sess. 352-353 (1978); S. Rep. No. 989, 95th Cong., 2d Sess. 62 (1978).

of section 502 continue the basic rule that interest stops running as of the petition date." Dean Pawlowic, *Entitlement to Interest Under the Bankruptcy Code*, 12 Bankr. Dev. J. 149, 155 (1995). *Accord* John C. McCoid, II, *Pendency Interest in Bankruptcy*, 68 Am. Bankr. L.J. 1, 9 (1994) ("Section 502(b)(2) disallows claims for unmatured interest, and thus codifies the basic rule.").[9]

2. The Ninth Circuit erred in holding that respondents were nevertheless entitled to postpetition interest on the unsecured Arizona state court judgment. As Judge McKeown recognized in her dissent, the state court judgment is an unsecured claim,[10] and the interest accrued on the judgment after the filing of petitioners' bankruptcy petitions is postpetition interest. *See* App. 6a-7a, 10a-11a. Thus, the $55 million in interest awarded to respondents falls squarely within the rule of Section 502(b)(2) and the "fundamental principle" that rule reflects. *Sexton*, 219 U.S. at 344.

By holding to the contrary, the Ninth Circuit's decision conflicts with the decisions of other courts that have correctly held that postpetition interest on a judgment is not permitted under Section 502(b)(2). For example, in *Bursch* v. *Beardsley & Piper*, 971 F.2d 108 (8th Cir. 1992), Richard and Loretta Bursch recovered a money judgment in a diversity action. The District Court partially denied their request for prejudgment interest, however, on the ground that while their suit was pending, Beardsley & Piper's parent corporation had entered into (and emerged from) bankruptcy. The District Court held

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[9] The rule has "three exceptions only." McCoid, 68 Am. Bankr. L.J. at 1. *See infra* at 14 & n.2.

[10] "There is no dispute that [respondents], as judgment creditors, but not lien creditors, hold unsecured claims." App. 6a n.1 (McKeown, J., dissenting).

that the Bursches were not entitled to prejudgment interest for the period of the parent's bankruptcy. The Eighth Circuit affirmed. It held that the District Court properly "relied on section 502(b) of the Bankruptcy Code, which provides that no interest will accrue after a bankruptcy filing and that any unmatured interest which becomes due after the filing date shall be disallowed." *Id.* at 113.

Similarly, in *In re United States Lines, Inc.*, 199 B.R. 476 (Bankr. S.D.N.Y. 1996), the Estate of one Alfredo Valverde brought an action in New York state court for the wrongful death of the deceased. After the Estate recovered a money judgment which included prejudgment and postjudgment interest at a rate of 10% per annum, the debtor moved the Bankruptcy Court for an order denying the Estate that portion of the judgment representing postpetition interest. Citing "the longstanding rule in bankruptcy that unsecured creditors are not entitled to postpetition interest on their claims," the Bankruptcy Court granted the debtor's motion. *Id.* at 481. The Estate urged the court "to use its equitable powers to allow for payment of interest" but the court refused, saying that it "is ultimately bound by the mandates and limits set forth in the Bankruptcy Code" and that "not even equity will permit this Court to allow a claim for postpetition interest." *Id. See also In re Fifth Ave. Jewelers, Inc.*, 203 B.R. 372, 381 (Bankr. W.D. Pa. 1996) (disallowing interest on a state court judgment "because, as of the petition filing date, it constituted 'unmatured interest' which is not permitted under 11 U.S.C. § 502(b)(2)").[11]

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[11] Although this Court will typically not grant certiorari to review a conflict between a Court of Appeals and a District Court, the rule is otherwise when the conflict involves a Bankruptcy Court decision. *See Pennsylvania Dep't of Pub. Welfare* v. *Davenport*,

3. Because the rule of Section 502(b)(2) clearly applies in this case, Judge McKeown was correct to say that her colleagues have "creat[ed] an unprecedented exception to the rule." App. 7a. There are two principal exceptions to the rule against postpetition interest. The first is that creditors may recover postpetition interest where the debtor ultimately proves to be solvent. *See* 11 U.S.C. § 726(a)(5); *Ron Pair*, 489 U.S. at 246. The second permits postpetition interest for oversecured creditors (*i.e.*, a creditor whose security is worth more than the principal and all interest combined). *See* 11 U.S.C. § 506(b); *United Savings*, 484 U.S. at 372-373.[12] The Ninth Circuit, however, "relie[d] upon neither of these recognized exceptions in reaching its result." App. 7a n.2 (McKeown, J., dissenting).

In carving out a heretofore unrecognized exception to Section 502(b)(2), the Ninth Circuit's decision squarely conflicts with *In re Fesco Plastics Corp.*, 996 F.2d 152 (7th Cir. 1993). In *Fesco Plastics*, a group of unsecured creditors who, through no fault of their own, were paid five years later than other creditors of the same class sought interest for the period that payment was improperly withheld. But the Seventh Circuit said that the creditors were "requesting interest that would have had to accrue after the petition was filed. The cases and § 502(b)(2), however, make it clear that interest stops

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495 U.S. 552, 557 (1990) (granting certiorari "[t]o address a conflict among Bankruptcy Courts" and citing the conflicting decisions of two such courts). Thus, the conflicts between the Ninth Circuit's decision in this case and Bankruptcy Court decisions support a grant of certiorari. In any event, as shown herein, the Ninth Circuit's decision also conflicts with other circuit court decisions.

[12] The third, and final, exception applies when the creditor is secured and the collateral earns income after the petition filing date. *See* Pawlowic, 12 Bankr. Dev. J. at 155; McCoid, 68 Am. Bankr. L.J. at 1.

accruing when the petition is filed." *Id.* at 156. Going further, the Seventh Circuit rejected the creditors' request that the court use its equitable power "to acknowledge a fresh exception to § 502(b)(2)." *Id.* The Seventh Circuit explained:

> The problem with the plea for an equitable exception to the general rule of § 502(b)(2) is that the exceptions to that rule are expressly stated in the Bankruptcy Code. *See* 11 U.S.C. §§ 506(b) (oversecured creditors), and 726(a)(5) (surplus estate). If Congress had intended to recognize other exceptions it would have put them in the Code as well. *See United Savings*, 484 U.S. at 372-373. For a bankruptcy court to create a new exception would go beyond [its] authority. [*Id.*]

See also In re Twin Parks Ltd. Partnership, 720 F.2d 1374, 1377 (4th Cir. 1983) (holding that an award of postpetition interest was error and explaining that "[n]either the district court nor [the creditor] on appeal attempted to justify the award of postpetition interest under any of [the] exceptions" to the rule against such interest), *cert. denied*, 465 U.S. 1103 (1984).

In conflict with *Fesco Plastics* and *Twin Parks*, the Ninth Circuit went beyond its authority and "creat[ed] an unprecedented exception" (App. 7a (McKeown, J., dissenting)) to the Bankruptcy Code beyond those expressly recognized by Congress. It is well established that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980). *See, e.g., United States* v. *Smith*, 499 U.S. 160, 167 (1991) ("Congress' express creation of these two exceptions convinces us that the Ninth Circuit erred in inferring a third exception") (citing

Andrus).[13] And as the *Fesco Plastics* court recognized, this rule certainly applies in the context of the Bankruptcy Code. *See Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 206 (1988) (holding that the Court of Appeals erred in recognizing an exception to absolute priority rule of 11 U.S.C. § 1129(b) not supported by "the statutory language and the legislative history of § 1129(b)"). For the Ninth Circuit to recognize an exception to Section 502(b)(2) beyond those Congress expressly included in the Bankruptcy Code was improper and beyond its authority. *See Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. at 563 ("refus[ing] to carve out a broad judicial exception" to bankruptcy rule where "the statutory language plainly reveals Congress' intent" not to have such an exception). The Ninth Circuit stands alone in recognizing this exception, and its stance frustrates the national—and constitutional—policy of having "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8. *See Pelofsky* v. *Wallace*, 102 F.3d 350, 356 n.7 (8th Cir. 1996) (noting "the importance of uniform nationwide standards in administering bankruptcy cases").

4. The only answer given by the Ninth Circuit, the BAP, and the Bankruptcy Court to the argument that Section 502(b)(2) bars the award of postpetition interest in this case was that respondents were entitled to such

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[13] As an interpretive matter, the Ninth Circuit's approach violates the canon *expressio unius est exclusio alterius*—*i.e.*, the expression of one is the exclusion of others. *See Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying canon and rejecting judicially-created exception to federal pleadings rule "not include[d] among the enumerated" exceptions to the rule); *TVA* v. *Hill*, 437 U.S. 153, 188 (1978) (due to Congress' enactment of certain exemptions in federal statute "under the maxim *expressio unius est exclusio alterius*, we must presume that these were the only [exemptions] Congress intended").

interest because the state court judgment conditioned petitioners' right to take their stock on the payment of such interest. As the Ninth Circuit put it, petitioners "had no right whatever to obtain the property of [respondents] until they complied with the terms of the Arizona judgment." App. 4a. In other words, petitioners could not take respondents' stock "without paying the full price, which included all of the interest." App. 4a.

What the courts below failed to understand, however, is that the Bankruptcy Code altered that price as a matter of law. Even if postjudgment interest were part of the original price of the stock, Section 502(b)(2) affected respondents' right, as unsecured creditors, to be paid that interest. Put another way, the effect of Section 502(b)(2) is to permit a debtor to acquire an unsecured creditor's property for a price less than that which was originally bargained for. This is one of the compromises that the Bankruptcy Code makes.

In *In re Seal*, 192 B.R. 442 (Bankr. W.D. Mich. 1996), for example, the Bankruptcy Court held that the debtors became the legal owners of an automobile after they paid the principal balance due on the vehicle, *but without paying any postpetition interest.* Prior to bankruptcy, the debtors bought an automobile and agreed to pay 10% annual interest on the unpaid balance of the original purchase price. The Bankruptcy Court determined that the debtors owed the seller of the vehicle $2,173.47, which represented the principal balance due as of the petition date ($2,929.00), plus prepetition interest on that amount ($92.11), less a postpetition payment made by the bankruptcy trustee ($847.64) [$2,929.00 + $92.11 — $847.64 = $2,173.47]. *See id.* at 446, 454-455. The court also concluded that the debtors owed no postpetition interest. *See id.* at 455 ("An unsecured creditor, as is [the seller], is generally not entitled to receive

postpetition interest. 11 U.S.C. § 502(b)(2)."). After the debtors discharged their $2,173.47 debt to the seller —which, again, included no postpetition interest—the court held that "[t]he Debtors now own the vehicle free and clear of any asserted interest by [the seller]." *Id.* at 458.[14]

Seal conflicts with the decision below. Like the stock at issue in this case, the "full price" (to use the Ninth Circuit's words) of the automobile included the debtors' agreement to pay "all of the interest." But in *Seal*, unlike this case, the debtors obtained the creditor's property without paying that portion of the interest that was postpetition. The Bankruptcy Court in *Seal* correctly recognized that the unsecured creditor's right to interest ended with the filing of a bankruptcy petition. *See also In re Ross*, 162 B.R. 785, 790 (Bankr. N.D. Ill. 1993) (disallowing postpetition interest on an automobile loan pursuant to Section 502(b)(2)).

The BAP claimed that "[a] debtor cannot use bankruptcy to deprive a creditor of its state law property rights," App. 27a, but that is precisely what happens all the time in a bankruptcy proceeding. Judge McKeown was correct when she said that "a creditor's state law rights are subordinate to the operation of federal bankruptcy law." App. 11a (citing *BFP* v. *RTC*, 511 U.S. 531, 545 (1994)). *See Vanston Bondholders*, 329 U.S. at 163 ("When and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by

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[14] The court found that the seller owed the debtors $2,970.40 in damages for willfully refusing to turn over title to the vehicle. After subtracting what the debtors owed on the automobile from their damages, the court concluded that the debtors owned the car and that the seller owed the debtors $796.63 [$2,970.40−$2,173.47 = $796.93]. *See* 192 B.R. at 457.

federal law."). In *Bursch* v. *Beardsley & Piper, supra*, for example, the creditors argued that "they are entitled to judgment interest as a matter of right under Minnesota law," but the Eighth Circuit deemed that fact irrelevant, saying that "[t]his may be so, but once a bankruptcy petition is filed, federal law, not state law, determines a creditor's rights." 971 F.2d at 113-114. Here, the Ninth Circuit "read[] the terms of a state court judgment as trumping federal bankruptcy law—this is the tail wagging the dog." App. 11a (McKeown, J., dissenting).

5. As a final matter, it should be noted that the novelty of the Ninth Circuit's ruling cuts for—not against—granting certiorari in this case. *See Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (granting certiorari to consider the Ninth Circuit's "novel application of federal statutory law"); *United States* v. *Padilla*, 508 U.S. 77, 81 (1993) (per curiam) (granting certiorari because "[t]he Ninth Circuit appears to stand alone in embracing the 'coconspirator exception' " to Fourth Amendment standing rule); *United States* v. *Gouveia*, 467 U.S. 180, 182 (1984) ("We granted certiorari to review the Court of Appeals' novel application of our Sixth Amendment precedents"); *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981) ("We granted certiorari to consider the validity of the Court of Appeals' novel exception to the doctrine of res judicata") (citations omitted). *See also Norwest Bank*, 485 U.S. at 199 (granting certiorari in Bankruptcy Code case because the Court of Appeals' "conclusion [is] at odds with the Code and our cases"). Granting the writ here would be entirely consistent with this Court's certiorari practice.

* * * *

As shown above, the Ninth Circuit erred in failing to follow Section 502(b)(2)—a "fundamental principle" of

American bankruptcy law. *Sexton*, 219 U.S. at 344. And its decision conflicts in numerous respects with the decisions of this Court and other appellate and bankruptcy courts. Review of the decision below by this Court is therefore warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 97-17369

BAP No. AZ-96-01884-KlJoRy

IN RE: EDWARD J. SHOEN; IN RE: JAMES P. SHOEN; IN RE: AUBREY JOHNSON; IN RE: JOHN DODDS; IN RE: WILLIAM CARTY,

Debtors.

EDWARD J. SHOEN; JAMES SHOEN; AUBREY JOHNSON; JOHN M. DODDS; WILLIAM CARTY; AMERCO,

Appellants,

v.

SAMUEL W. SHOEN; CECILIA M. HANLON, a/k/a CECILIA M. SHOEN-HANLON; KATRINA CARLSON, a/k/a KATRINA SHOEN-CARLSON; SAMWILL, INC.; KATTYDID, INC.; MICKL, INC.,

Appellees.

No. 98-15455

IN RE: EDWARD J. SHOEN; JAMES P. SHOEN; AUBREY JOHNSON; JOHN DODDS; WILLIAM CARTY,

Debtors.

SAMUEL W. SHOEN; CECILIA M. HANSON, a/k/a CECILIA M. SHOEN-HANSON; KATRINA CARLSON, a/k/a KATRINA SHOEN-CARLSON; SAMWILL, INC., now called Katabasis International, Inc.; CEMAR, INC.; KATTYDID, INC.; MICKL, INC.,

Appellants,

v.

EDWARD J. SHOEN; JAMES SHOEN; AUBREY JOHNSON; JOHN M. DODDS; WILLIAM CARTY; AMERCO,

Appellees.

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Klein, Jones, and Ryan, Bankruptcy Judges, Presiding

Argued and Submitted
March 9, 1999—San Francisco, California

Filed May 6, 1999

Before: Ferdinand F. Fernandez and M. Margaret McKeown, Circuit Judges, and Charles R. Weiner,[1] District Judge.

Per Curiam Opinion; Dissent by Judge McKeown.

OPINION

PER CURIAM:

Edward J. Shoen, James P. Shoen, Aubrey K. Johnson, John M. Dodds, William E. Carty, and AMERCO (collec-

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[1] Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

tively the Edward Shoen Interests) appeal the bankruptcy court's order which awarded post-petition interest to Samuel W. Shoen, Katabasis International, Inc., Michael Shoen, Mickl, Inc., Katrina Shoen-Carlson, Kattydid, Inc., Cemar, Inc., and Cecilia M. Shoen-Hanlon (collectively the Samuel Shoen Interests). The Samuel Shoen Interests appeal the bankruptcy court's order which determined that the post-petition interest at the Arizona judgment rate stopped running once the Edward Shoen Interests deposited the then accrued interest in an interest bearing Escrow Account under the auspices of the bankruptcy court. We affirm.

1. The post-petition interest problem arose because of a rather unusual judgment issued by the Arizona Superior Court in which the Samuel Shoen Interests were required to transfer all of their shares of AMERCO common stock to the Edward Shoen Interests once the latter paid $461,838,000 together with accrued interest at 10 percent per annum plus costs to the former. The Edward Shoen Interests promptly filed bankruptcy and sought to use the protections afforded by those proceedings in order to pay something other than the amount decreed by the Arizona Superior Court, and also obtain transfer of the stock. In other words, they would have liked it if they could keep much of their money and still get the stock. We agree with the bankruptcy court and the Bankruptcy Appellate Panel that the Edward Shoen Interests are not entitled to that Panglossian a result. We do so for the reasons articulated by the BAP which we adopt. *See Shoen v. Shoen (In re Edward J. Shoen)*, BAP No. AZ-96-1884-KJRy pages 11-16 (B.A.P. 9th Cir. Oct. 22, 1997) (unpublished disposition).[2] We add only a few reflections. It is necessary to analytically place the Ari-

[2] We attach this decision as Appendix A to this opinion.

zona judgment into one category or another, although it does not comfortably fit in any standard ones. In our opinion, the BAP chose the best fit when it dubbed the judgment "a judicially prescribed sale of stock." *Id.* at 14. The Arizona Superior Court told the Samuel Shoen Interests that if they wanted their damages they had to turn over their stock to the Edward Shoen Interests, and gave the Edward Shoen Interests the consolation of knowing that once they paid all that was owed they could have the stock. Call it what you like, but the Edward Shoen Interests had no right whatever to obtain the property of the Samuel Shoen Interests until they complied with the terms of the Arizona judgment. That the bankruptcy court required them to do just that violates neither the policies, the purposes, nor the letter of the bankruptcy law. In short, the Edward Shoen Interests could not obtain transfer of the stock of the Samuel Shoen Interests without paying the full price, which included all of the interest.

2. Not to be outdone in the have-your-cake-and-eat-it sphere, the Samuel Shoen Interests seek to mulct the Edward Shoen Interests for even more interest than the $55,000,000 deposited in the Escrow Account plus interest which has been accruing on that deposited amount. They find a wedge for their argument in the somewhat uncertain state of the paper record when the rest of the case was resolved by the bankruptcy court. That court was well aware of what had gone on throughout the proceedings and at the time when the rest of the issues were settled. It was also aware of what the parties and the court really intended at that time. We cannot say that it erred in construing what it was doing at the time of plan approval, and, again, we are satisfied that the BAP has articulated the reasoning and result quite satisfactorily. *See id.* at 16-22.

Even if that were not so, we are equally satisfied that the interest stopped as a matter of law when the $55,000,000 was deposited into the Escrow Account. This was no mere escrow account controlled by a debtor while liability was being litigated on appeal. *Cf. International Telemeter Corp. v. Hamlin Int'l Corp.*, 754 F.2d 1492, 1495-96 (9th Cir. 1985). It was, rather, more in the nature of an unconditional tender of the money. *Cf. Homes & Son Constr. Co., Inc. v. Bolo Corp.*, 22 Ariz. App. 303, 306, 526 P.2d 1258, 1261 (1974); *Bartlett v. Heersche*, 209 Kan. 369, 374, 496 P.2d 1314, 1317-18 (1972). Of course, the tender was not entirely unconditional, but it was very close to that. The only condition was that the bankruptcy court determine that the post-petition interest amount was owed. And if the Samuel Shoen Interests could not access the money immediately, neither could the Edward Shoen Interests enjoy its fruits in the meantime. Notably, the use of the Escrow Account in this case was part of a deal that also freed up the principal amount—$461,838,000—for the Samuel Shoen Interests' use right away. That was a not inconsiderable benefit, and went far beyond what one would obtain from a mere supersedeas bond.

AFFIRMED.

McKEOWN, Circuit Judge, dissenting:

Because I find no magic in the nature of the Arizona judgment that removes it from the general rule disallowing postpetition interest on unsecured claims, I respectfully dissent.

I.

Nature of the Judgment

The majority takes a straightforward state court judgment for damages and transforms it into "a judicially prescribed sale of stock" that is impervious to the operation of federal bankruptcy law. As the majority acknowledges, this is an effort "to analytically place" the judgment into a category, even one that does not "comfortably fit." The judgment calls for no such creativity on our part.

This is not a case, as the majority suggests, where one party has sought in bad faith to use bankruptcy proceedings in order to escape its rightful creditors and obtain a "free lunch." The bankruptcy court expressly ruled to the contrary, finding "no evidence that the bankruptcies were filed with malice or ill-will" but rather that the debtors sought to "gain the beneficial ends intended by Congress." *In re Shoen*, 193 B.R. 302, 312-13 (Bankr. D. Ariz. 1996). The Bankruptcy Appellate Panel ("BAP") aptly described this appeal as "a $55 million mopping-up operation in a $1.5 billion family feud that has been waged for longer than World Wars I and II combined." Given the long and tortured history of this litigation, it seems particularly inappropriate at this stage for us to make judgments about the legal maneuverings of one side or the other. Instead, our role is to analyze the judgment vis-a-vis the bankruptcy rules. The rule is clear: the Bankruptcy Code prohibits postpetition interest on unsecured claims. 11 U.S.C. § 502(b)(2). The Arizona judgment is an unsecured claim.[1] The interest ac-

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[1] There is no dispute that the Samuel Shoen Interests, as judgment creditors, but not lien creditors, hold unsecured claims. *See*

crued on the judgment after the filing of the bankruptcy is postpetition interest. What then is the majority's basis for deviating from the rule? None, other than creating an unprecedented exception to the rule.[2]

The Arizona judgment is not the anomaly that the majority describes. To put the judgment in context, it is necessary to go back to the beginning of the litigation. The suit stems from an intrafamily feud over AMERCO, the holding company for U-Haul International, Inc. and several related corporations. The Samuel Shoen Interests (the Creditors) claimed that the Edward Shoen Interests (the Debtors) breached their fiduciary duties and engaged in other tortious conduct. The genesis of this appeal lies in the Arizona court's initial determination that, in order to avoid a double recovery, the Samuel Shoen Interests would have to choose either to accept a money judgment for their claims or to dismiss the suit and retain their stock. In other words, they had to elect a remedy at the outset and then live by that decision. They chose to seek the judgment.[3]

The jury awarded the Samuel Shoen Interests $1.48 billion in compensatory damages (based on a finding of a per share decrease in value from $81.12 to $0.48) and $70 million in punitive damages against Joe Shoen. The court found that the verdict was based on an inflated

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Olympia Equip. Leasing Co. v. Western Union Tel. Co., 786 F.2d 794, 799 (7th Cir. 1986).

[2] There are two exceptions to 11 U.S.C. § 502(b)(2): first, where the debtor is actually solvent, 11 U.S.C. § 726(a)(5); and second, where the creditor is oversecured, 11 U.S.C. § 506(b). *See In the Matter of Fesco Plastics Corp., Inc.*, 996 F.2d 152, 155-56 (7th Cir. 1993). While there may be a question as to the solvency of the debtor here, *see post*, the majority relies upon neither of these recognized exceptions in reaching its result.

[3] We offer no view whether such election was appropriate or required.

valuation of the company and issued a remittitur, requiring the Samuel Shoen Interests to accept $461,838,000 in compensatory damages and $7 million in punitive damages or to have a new trial on damages. The Samuel Shoen Interests accepted the remittitur on February 14, 1995 and judgment was entered on February 21, 1995.

The terms of the judgment were as follows:

> Upon payment or tender of the total dollar amount set forth above [$461,838,000], together with accrued interest and taxable costs, all Plaintiffs' shares of AMERCO Common Stock identified above shall be transferred to Defendants or their designees.
>
> Plaintiffs are hereby awarded interest on the amount of this Judgment ($461,838,000) at the rate of ten percent (10%) per annum until paid, said interest to accrue from February 14, 1995.

In addition to the $461,838,000 "Judgment," the Arizona court awarded the Samuel Shoen Interests interest from the date of their acceptance of the remittitur (February 14, 1995) at the Arizona statutory rate. *See* A.R.S. § 44-1201(A) (1998) (fixing interest on judgments at 10 percent per annum). As is typical, postjudgment interest was to accrue until the judgment was paid. Most importantly, in keeping with the election of remedies, the judgment required the Samuel Shoen Interests to transfer their shares of AMERCO stock to the Edward Shoen Interests upon payment of the $461,838,000 "together with accrued interest and taxable costs."

Although the stock transfer provision complicates the judgment somewhat, it does not, as the majority holds, create a new brand of "judicial sale." The majority apparently believes that unless postjudgment interest is collected, the Samuel Shoen Interests will not have received full compensation. However, this ignores the intervention

of the bankruptcy filing. In a typical judgment, the creditor receives the judgment amount plus postjudgment interest. The postjudgment interest is generally a creation of state statute designed to make the debtor whole if payment is delayed. A satisfaction of judgment is not entered until the judgment and interest are paid in full, just as here the stock would not be transferred until the judgment amount plus interest were paid. However, if bankruptcy is filed after entry of the judgment, postjudgment interest stops accruing and the allowed claim becomes the judgment amount plus any interest accrued prior to the bankruptcy filing. The same analysis should apply to the Arizona judgment here.

This case is not dissimilar from one in which the plaintiff obtains a prejudgment writ of attachment against the property of the debtor. In that case, where the plaintiff obtains a money judgment for more than the amount of the collateral, and the judgment debtor thereafter files for bankruptcy, the lienholder holds an undersecured claim and is not entitled to postpetition interest on the judgment. *See* 11 U.S.C. §§ 502(b)(2), 506(b); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 372-73 (1988) (finding that under § 506(b), "the undersecured creditor . . . falls within [§ 502(b)(2)'s] general rule disallowing postpetition interest."). That result is not changed by the fact that, absent the bankruptcy filing, payment of any postjudgment interest awarded would be required before the judgment could be satisfied and the writ extinguished.

Guidance may also be found in our analysis in *In re Del Mission Ltd.*, 998 F.2d 756, 757 (9th Cir. 1993). There the bankruptcy court approved the sale of Del Mission's liquor license after payment of " 'necessary' amounts" to the California Employment Development Department ("EDD") and the State Board of Equalization

("Board"). EDD and the Board claimed a statutory right not only to all unpaid taxes and penalties, but also to accrued interest before they would transfer the license. We rejected their claim for interest, holding that "[a]uthority to pay 'necessary' amounts does not . . . permit payment of prohibited postpetition interest on prepetition taxes." *Id.* at 757.

II

Section 502(b)(2) Disallows Postpetition Interest On The Judgment

Here, the majority creates confusion by reading into the stock transfer provision the requirement that all postjudgment interest be paid before the Edward Shoen Interests may receive the stock. That position fails (1) to accord due deference to the Bankruptcy Code's disallowance of postpetition interest on unsecured claims, (2) to acknowledge the precise valuation of the stock undertaken by the Arizona court, and (3) to account for the analytical distinction between prejudgment and postjudgment interest.

Section 502(b)(2) provides for the allowance of certain claims against a bankrupt estate "except to the extent that . . . such claim is for unmatured interest."[4] 11 U.S.C. § 502(b)(2); *see also In re Del Mission*, 998 F.2d at 757 ("The Code . . . prohibits claims for postpetition interest on unsecured claims."); 4 Lawrence P. King, Collier on Bankruptcy ¶ 502.03(3)(a) (15th ed. 1996) (§ 502(b)(2) suspends "the accrual of interest on claims as of the date of the filing of the petition.").[5]

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[4] "Unmatured" interest is interest that is "not yet due and payable" at the time a petition is filed. 4 Lawrence P. King, Collier on Bankruptcy ¶ 502.03(3)(a) (15th ed. 1996).

[5] The rationale for the proscription on postpetition interest is that it promotes certainty and eases administration of the estate by setting a date on which claims are fixed. *See Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 164 (1946).

Neither the BAP nor the majority explains why § 502 (b)(2) is inapplicable to this case. By ignoring § 502 (b)(2), the majority violates the well established principle that a creditor's state law rights are subordinate to the operation of federal bankruptcy law. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 545 (1994) (operation of the Bankruptcy Code is "unimpeded by contrary state law" where the "meaning of the Bankruptcy Code's text is itself clear"); *In re Mankin*, 823 F.2d 1296, 1308 (9th Cir. 1987) ("Congress can, and often has, exercised its bankruptcy power to modify, or even abrogate, creditors' rights in the independent federal interest of providing an equitable restructuring or liquidation of a bankrupt's estate."). Whereas prepetition interest is governed by state law, the Supreme Court reminds us that entitlement to postpetition interest "has long been decided by federal law." *Vanston*, 329 U.S. at 163; *see also Bursch v. Beardsley & Piper*, 971 F.2d 108, 114 (8th Cir. 1992) ("[O]nce a bankruptcy petition is filed, federal law, not state law, determines a creditor's rights."). The majority reads the terms of a state court judgment as trumping federal bankruptcy law—this is the tail wagging the dog.

Nothing in the stock transfer provision of the judgment permits us to disregard § 502(b)(2)'s clear prohibition against the accrual of postpetition interest on unsecured claims. By its very terms, the judgment provides for transfer of the stock upon payment of the $461,838,000, "together with *accrued interest* and taxable costs." Under § 502(b)(2), by operation of the bankruptcy laws, the postjudgment interest stopped accruing once the petitions were filed. Therefore, the finding that no postpetition interest was due complies both with the terms of the judgment and with § 502(b)(2)

The majority's claim that the stock transfer provision compels a different result ignores the careful evaluation of the stock undertaken by the Arizona court. The trial

judge undertook a reasoned and well documented path to reduce the staggering jury verdict to the remittitur amount. The court first determined the most reliable valulation of AMERCO at the time of the takeover attempt ($930 million) and then divided that amount by the percentage of the Samuel Shoen Interests' combined ownership at that time (49.66%). The resulting figure ($461,838,000) reflected the "value of Plaintiffs' shares" and constituted the "judgment." The judgment (remittitur) amount was a proxy for the damages caused by the breach of fiduciary duty and other claimed wrongs. Thus, by paying the judgment amount of $461,838,000 plus prejudgment interest, the Edward Shoen Interests paid the full amount of compensation awarded by the Arizona court in exchange for the Samuel Shoen Interests' stock. The Edward Shoen Interests did not, as the majority suggests, receive the stock for less than its value. Unlike the majority, I see no Pangloss at work here.

Finally, the majority reaches a different conclusion, in part, because it fails to distinguish between prejudgment and postjudgment interest. Prejudgment interest constitutes part of the compensation awarded for a plaintiff's loss. *See Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1988) ("[P]rejudgment interest is an element of [the plaintiff's] complete compensation.") (internal quotation marks and citation omitted); *In re Stoecker*, 5 F.3d 1022, 1027 (7th Cir. 1993) ("[P]rejudgment interest is part of the relief sought by the plaintiff to rectify the defendant's wrong."). In contrast, postjudgment interest serves an entirely different purpose: "to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." *Kaiser Aluminum & Chem. Corp. v. Bornjorno*, 494 U.S. 827, 835-36 (1990). Here, the interest awarded before the judgment was entered on February 21, 1995 should be

characterized as prejudgment interest. The postjudgment interest component of the judgment—interest awarded after entry of the judgment—was not part of the compensation awarded in exchange for the Samuel Shoen Interests' stock.[6] Accordingly, there was no requirement that such interest be paid in the face of § 502(b)(2)'s disallowance of postpetition interest on unsecured claims.[7]

III

Conclusion

Although I would reverse the decision of the BAP, the Edward Shoen Interests would hardly be home free under my analysis. A key hurdle would remain because the solvency of the debtor is an exception to the application of § 502(b)(2), *see* 11 U.S.C. § 726(a)(5); *Timbers of Inwood Forest*, 484 U.S. at 379, and cannot be determined on the record before us. Accordingly, I would reverse and remand to the BAP with instructions to remand to the bankruptcy court for further proceedings consistent with the above analysis, including a determination of the Edward Shoen Interests' solvency at the time they filed their petitions.

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[6] This conclusion is further buttressed by the fact that whereas the merits of the dispute were governed by the substantive law of Nevada, the judge awarded interest pursuant to Arizona procedural law.

[7] Of course, the fact that postjudgment interest merely penalizes for the delay in paying the judgment does not absolve the usual judgment debtor of the obligation to pay it. However, because the postjudgment interest awarded by the Arizona court instantly became *postpetition* interest when the Edward Shoen Interests filed their bankruptcy petitions on the day the judgment was entered, such interest is disallowed under § 502(b)(2).

APPENDIX A

UNITED STATES BANKRUPTCY
APPELLATE PANEL
OF THE NINTH CIRCUIT

BAP No. AZ-96-1884-KJRy
AZ-96-1911

Bk. No. 95-1430-PHX-JMM
(Jointly Administered Under This Case Number)

IN RE EDWARD J. SHOEN, *et al.*,
Debtors.

EDWARD J. SHOEN, JAMES P. SHOEN,
AUBREY K. JOHNSON, JOHN M. DODDS,
WILLIAM E. CARTY, and AMERCO,
Appellants/Cross-Appellees,

v.

SAMUEL W. SHOEN, KATABASIS INTERNATIONAL, INC.,
MICHAEL SHOEN, MICKL, INC., KATRINA SHOEN
CARLSON, KATTYDID, INC., CEMAR, INC., and
CECILIA M. SHOEN HANLON,
Appellees/Cross-Appellants.

Argued and Submitted on July 24, 1997,
at Phoenix, Arizona

Filed—October 22, 1997

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable James M. Marlar, Bankruptcy Judge, Presiding.

MEMORANDUM

Before: KLEIN,[1] JONES and RYAN, Bankruptcy Judges.

INTRODUCTION

This appeal is a $55 million mopping-up operation in a $1.5 billion family feud that has been waged for longer than World Wars I and II combined. It requires a determination of whether the bankruptcy court correctly concluded that interest accrues postpetition on a $469 million judgment for breach of fiduciary duty (reduced on remittitur from $1.48 billion) and, if so, whether it correctly ruled that $55 million was the proper amount of such interest under the terms of a confirmed, stipulated plan of reorganization.

The feud relates to control of the corporation named AMERCO, which is owned primarily by members of the Shoen family, which corporation owns a number of subsidiary corporations, including U-Haul International, Inc.

The feud began when the Shoen family divided into factions behind Leonard S. Shoen ("Leonard"), the founder of AMERCO, and Edward J. Shoen ("Joe"), one of Leonard's thirteen children by several marriages. Leonard and Joe differed about how to run the family business. In 1986, Leonard left the AMERCO management team

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[1] Honorable Christopher M. Klein, Bankruptcy Judge for the Eastern District of California, sitting by designation.

and, with several of his other children,[2] began secretly orchestrating a hostile takeover. When Joe and his faction,[3] owning slightly fewer shares than Leonard's faction, learned of the plot, they responded by exploiting their status as corporate directors to have additional AMERCO stock issued to five key employees, and to establish a "poison pill" strategy that made it impossible for Leonard to wrest control from Joe. When the dust settled, the takeover attempt was blocked; Leonard's faction controlled 47 percent of the common stock, and Joe's faction controlled 44 percent. Joe was ensconced as the Chairman of the Board of AMERCO with his faction firmly in control. The feud was on.[4]

FACTS

This appeal and cross-appeal stem from litigation that was commenced in 1988, when members of Leonard's faction ("plaintiffs")[5] sued members of Joe's faction, including Joe, Paul F. Shoen, James P. Shoen, Aubrey K.

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[2] Leonard's faction included his children Sam, Michael, Mary Anna, Cecilia, Theresa, and Katrina, who then owned 49.66 percent of AMERCO common stock.

[3] Joe's faction included James Shoen, Paul Shoen, and other family members, who together, held a slightly smaller block of AMERCO common stock.

[4] The details are more comprehensively stated in the bankruptcy court's published opinion explaining its refusal to confirm plans previously proposed by the debtors. *In re Shoen*, 193 B.R. 302 (Bankr. D. Ariz. 1996).

[5] The plaintiffs in the state court action included Samuel W. Shoen, Mary Anna Shoen-Eaton, Cecilia M. Shoen Hanlon, Katrina M. Shoen, Theresa Romero, Michael L. Shoen, and the following Arizona corporations: Samwill, Inc.; Cemar, Inc.; Kattydid, Inc.; Thermar, Inc.; L.S.S. Inc.; Mickl Inc.; and Maran Inc.

Leonard Shoen does not appear to have been a plaintiff in the state court litigation.

Johnson, William E. Carty, John M. Dodds, and AMERCO ("defendants") in the Maricopa County, Arizona, Superior Court for, inter alia, breach of fiduciary duty. Plaintiffs claimed that their stock was rendered worthless by defendants' conduct. This litigation has come to be known as the "Share Case," and the cross-appellants in this appeal are sometimes referred to as the "Share Case plaintiffs."

The state court, perhaps in an effort to reduce the opportunity for further feuding, ruled during the trial that, if the plaintiffs prevailed and were awarded damages on their worthless stock theory, there would be a "double recovery" inherent in permitting the plaintiffs to collect money damages and to retain their stock. Hence, before allowing the case to go to the jury, the state court made the plaintiffs choose between either: (1) dismissing the case and retaining their stock; or (2) surrendering their stock upon payment of an amount to be determined by the jury. The plaintiffs chose the latter option, agreed that surrender of stock would be a condition of a money judgment, and presented their case to the jury.

The jury returned a verdict finding that the defendants had, inter alia, breached their fiduciary duties, which resulted in the diminution of value of plaintiffs' stock by approximately $1.48 billion. The jury then awarded the plaintiffs $1.48 billion in compensatory damages against all defendants, and $70 million in punitive damages against Joe.

Following a remittitur that was accepted by the plaintiffs, the state court entered a judgment that reduced compensatory damages to $461,838,000 and punitive damages to $7,000,000. The judgment was entered on February 21, 1995

BANKRUPTCY PROCEEDING

The same day as the state court judgment was entered, February 21, 1995, Joe, James P. Shoen, Aubrey K. Johnson, John M. Dodds, and William E. Carty ("debtors"), each of whom was a director of AMERCO and a judgment debtor in the state court proceeding, filed chapter 11 bankruptcy petitions, which were promptly ordered jointly administered.

The debtors proposed several plans of reorganization that provided for two options: (1) payment of the state court judgment in kind with property worth $461,838,000 plus 10 percent interest, in lieu of money; or (2) payment of $350 million cash. In either event, AMERCO, a nondebtor, would indemnify the debtors.

Ultimately, the bankruptcy court was asked, over objection, to confirm plans containing the property swap proposal. The court, in a published opinion, refused to confirm the proposed plans "because they include provisions which require the Share Case Plaintiffs to surrender their valuable AMERCO common stock without a corresponding requirement on the part of the Debtors to satisfy, in cash, the explicit terms of the Share Case Judgment." *In re Shoen*, 193 B.R. 302, 317 (Bankr. D. Ariz. 1996).

The bankruptcy court reasoned that the state court judgment in the Share Case, while not an executory contract, must be analyzed as such because it was more than a mere money judgment and required performance from both parties. Such performance would require the defendants to pay the outstanding balance of the compensatory damages award, which includes interest accruing at 10 percent, and taxable costs. The plaintiffs, in turn, would be required under the state court judgment to transfer their AMERCO shares back to the defendants (specifically, to AMERCO), upon payment of the judgment debt.

The bankruptcy court determined that the transfer of stock was conditioned upon the full payment of the state court judgment and concluded that the obligation to transfer stock was a "judicially-ordered right to acquire property for a pre-arranged price." *Id.* at 314. As such, the right to acquire the specific property of another is a creature of state law that cannot be significantly modified in bankruptcy. *Id.* at 316. Consequently, the bankruptcy court held that the proposed plans' attempt to satisfy the state court judgment in kind by transferring property of allegedly comparable value was insufficient.[6]

The bankruptcy court also found that postpetition interest, which is generally disallowed in bankruptcy pursuant to § 502(b), subject to a solvency exception, would be required in this instance to satisfy the terms of the state court judgment's judicial sale of the stock.[7] *Id.* at

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[6] The bankruptcy court, lamenting the dismal prospects for any settlement, counseled:

> [G]iven the history of this dispute, it is certainly possible that a consensual plan may never be achieved under any circumstance. If that be the case, then these parties will probably be locked in perpetuity in the purgatory of continual conflict. However, a compromise such as mentioned above [debtors' payment of $350 million in cash and satisfaction of the balance either by (I) transferring property with an indisputable value equal to the remaining balance, or (ii) generating cash by selling a non-controlling block of Plaintiffs' stock] could be an acceptable solution for all concerned and is the *only* way to avoid the months, if not years of further litigation and appeals which will undoubtedly follow this and other decisions in this, and other cases. . . .

In re Shoen, 193 B.R. at 318 n.19.

[7] There was no discussion in the appellate briefs whether interest would continue to accrue postpetition on the theory that the debts would be nondischargeable under 11 U.S.C. § 523(a)(4) and (a)(6).

However, at the hearing on this appeal, plaintiffs' counsel represented that nondischargeability actions are pending, and indicated

317. Hence, plan confirmation was denied on March 4, 1996.

The denial of confirmation led to a prompt settlement that was embodied in consensual modifications to the plans of reorganization that the court had refused to confirm on March 4, 1996. These modifications caused the confirmation hearing to be resumed and concluded on March 7, 1996. The stipulated Order Confirming Plan was entered March 15, 1996, and was not appealed.

In the compromise modifications, the debtors and the Share Case plaintiffs agreed to disagree about postpetition interest by means of the functional equivalent of "bonding off" the disputed interest utilizing an escrow, with respect to which the bankruptcy court would determine the appropriate sum, if any, in a separate proceeding. Accordingly, the plans were modified to provide for: (1) full payment by AMERCO of the principal amount of the state court judgment in cash (Appellants' Excerpts of Record ("E.R.") 00955-00956); and (2) funding by AMERCO of an escrow account to assure payment of any postpetition interest that is finally adjudicated, in all

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that if his clients lose the appeal, they expect to litigate the nondischargeability actions.

We note in this connection that the jury in the state court action specifically found that debtors committed fraud, acted with malice, and breached their fiduciary duties. Although such findings suggest nondischargeability in neon lights, we are not presented with and do not purport to decide that question in this appeal. If the debts were held to be nondischargeable, then plaintiffs would be entitled to postpetition interest at the state court judgment rate. *See Bruning v. United States*, 376 U.S. 358, 360 (1964) (postpetition interest on a nondischargeable tax debt is nondischargeable).

As discussed, *infra*, it is doubtful that the nondischargeability actions retain vitality following plaintiffs' agreement to a plan that pays the principal in full and that substitutes an escrow account for post-judgment interest. However, this precise issue is not before us.

litigation where the payment of postpetition interest is at issue, to be owed to the plaintiffs. E.R. 00948-00949. The modified plans provided for transfer of plaintiffs' stock to AMERCO. E.R. 00959-00964 (treatment of Class 3 claims).

The subsequent proceeding to determine the amount to be put into escrow was heard by the bankruptcy court on July 19, 1996, at the end of which it announced its ruling orally on the record. E.R. 01117-01145.

In that subsequent proceeding, the bankruptcy ruled that: (1) interest did continue to accrue postpetition; (2) that the "amount(s) required to be escrowed" would be the amount of postpetition interest accrued through the date of payment of the principal amount of the state court judgment, approximately $55 million; and (3) the plaintiffs were bound by their stipulation to the confirmed plans of reorganization that allocated the Effective Date Payoff to constitute full settlement and satisfaction of the judgment principal amount (plus interest from the date the remittitur was announced to the date of the petition) and that created the Escrow Account as a repository for the amount of unpaid postpetition interest, if any, that the court later determined to be owed. E.R. 01141-01142; Second Amended and Restated Debtors' Plans of Reorganization, ¶¶ 2.44, 2.45, 2.49, and 2.26A, E.R. 00790-00796.

The actual order resolving the subsequent proceeding was entered September 12, 1996. The bankruptcy court determined that interest did run postpetition at the Arizona 10 percent judgment interest rate until the escrow account was funded and determined that, once funded, interest would cease accruing. Thereafter, the earnings on the escrow account would be, according to the agreement of the parties, the sole source of subsequent in-

creases, which earnings might be more or less than 10 percent. The $55 million escrow account was promptly funded.

On September 16, 1996, the debtors filed a notice of appeal in which AMERCO joined. They challenge the portion of the bankruptcy court decision that requires debtors to pay postpetition interest to plaintiffs to satisfy the state court judgment's stock surrender provision.

Plaintiffs cross-appealed the portion of the bankruptcy court decision that held the plaintiffs to their stipulation, to accept the escrow account and its earnings in lieu of continued accrual of postpetition interest.[8]

JURISDICTION

We have jurisdiction under 28 U.S.C. § 158. The order confirming the plan of reorganization and attendant implementing order fixing the amount to be placed in escrow are final orders.[9]

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[8] On oral argument of this appeal, the plaintiffs' counsel conceded repeatedly that this was precisely what he agreed on behalf of his clients in what he repeatedly described as a "late night." And he conceded that the gravamen of the plaintiffs' cross-appeal is the desire to be relieved of the burden of this agreement.

[9] This could, however, be part of a piecemeal appeal. The Share Case plaintiffs expect to pursue post-juudgment interest at the Arizona judgment rate by way of nondischargeability actions in the event they lose on their appeal. Their theory would be that interest accrues postpetition on nondischargeable debts. As to the appeal, the subsequent nondischargeability proceeding would be unnecessary so long as the bankruptcy court's ruling remains undisturbed on the question of entitlement to postpetition interest. Whether such actions survive plan confirmation is an issue for another day. But, as to the cross-appeal, the effect of the agreement by the cross-appellants to substitute the escrow account for ongoing interest will plainly be a key issue in any subsequent litigation asserting that interest continues to accrue at the Arizona judgment interest rate instead of the amounts that acually are accrued in the escrow account.

STANDARD OF REVIEW

A bankruptcy court's conclusions of law are reviewed de novo and its findings of fact are upheld unless clearly erroneous. *Otto v. Niles (In re Niles)*, 106 F.3d 1456, 1459 (9th Cir. 1997); *Feder v. Lazar (In re Lazar)*, 83 F.3d 306, 308 (9th Cir. 1996).

ISSUES ON APPEAL

Whether interest at the Arizona judgment interest rate continued to accrue postpetition under the facts of this case.

ISSUE ON CROSS-APPEAL

Whether interest at the Arizona interest rate ceased to accrue when the Escrow Account created by section 2.26A of the confirmed plans of reorganization was funded.

DISCUSSION

I.

The issue of whether the bankruptcy court erred in ruling that postpetition interest on the state court judgment was an enforceable condition of the stock surrender provision in that judgment depends upon the characterization of the state court judgment as a judicially mandated sale of stock.

A

"Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v. United States*, 440 U.S. 48, 55 (1979)

Consequently, state law determines the validity of claims related to property interests. *Joseph F. Sanson Inv. Co. v. 268 Limited (In re 268 Limited)*, 789 F.2d 674, 677 (9th Cir. 1986) (citing *Butner*); *Spencer v. Pugh (In re Pugh)*, 157 B.R. 898, 901 (B.A.P. 9th Cir. 1993) (citing *Grogan v. Garner*, 498 U.S. 279, 283 (1991); *In re Johnson*, 756 F.2d 738, 741 (9th Cir.), *cert. denied*, 474 U.S. 828 (1985)). *See also* 4 COLLIER ON BANKRUPTCY ¶ 502.03[2][b] (Lawrence P. King, et al., eds., 15th ed. rev. 1997).

Where there is a judgment of an Arizona court of competent jurisdiction, the federal courts must give it the same full faith and credit as would be afforded in Arizona courts. 28 U.S.C. § 1738; *Swift v. Bellucci (In re Bellucci)*, 119 B.R. 763, 769 (Bankr. E.D. Cal. 1990). In this connection, we are not permitted to review the merits of the state court's judgment. Thus, for example, we do not consider whether the state court was correct in ruling that permitting the plaintiffs to retain their stock and recover money damages would have offended any "double recovery" rule. The bankruptcy court, however, was entitled to construe the terms and purposes of the underlying state court judgment for purposes of claim treatment under the Bankruptcy Code. *See In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991). A state court judgment is considered to be state law for purposes of determining the validity of claims. *See Punton v. Chapman (In re Chapman)*, 125 B.R. 284, 286 (Bankr. S.D. Cal. 1991); 49 C.J.S. *Judgments* § 3 (1997). Strict compliance with the terms of an Arizona judgment are required to satisfy an Arizona judgment. *Koepe v. Carter Hawley Hale Stores, Inc.*, 682 P.2d 425 (Ariz. Ct. App. 1984).

B

The bankruptcy court construed the state court judgment as creating two, independent mutual obligations based on the following language in the state court judgment:

> 1. The plaintiffs, each of them, shall have and recover judgment against the Defendants Edward J. Shoen, Paul F. Shoen, James P. Shoen, William E. Carty, Aubrey K. Johnson, and John M. Dodds, jointly and severally [in the amount of $461,838,000].
>
> 2. Upon payment or tender of the total dollar amount set forth above, together with accrued interest and taxable costs, all Plaintiffs' shares of AMERCO Common Stock identified above shall be transferred to Defendants or their designees.
>
> 3. Plaintiffs are hereby awarded interest on the amount of this Judgment ($461,838,000) at the rate of ten percent (10%) per annum until paid, said interest to accrue from February 14, 1995.

E.R. 00016-00018 (citing Judgment on Special Verdict and Remittitur, dated February 21, 1995, at 3).

The bankruptcy court characterized the language in paragraph 1 that ordinarily gives rise to an unsecured debt, as being inextricably intertwined with paragraph 2, the stock surrender provision, in a manner that created "a judicially-set sale price for stock upon payment of a specific sum." E.R. 00750. The bankruptcy court held that the state court clearly set the terms for the acquisition of the stock, which it viewed as a property right. Consequently, plaintiffs contend that, although interest accruing on a postpetition, unsecured debt is generally disallowed in bankruptcy under § 502(b)(2), the continued

accrual of interest is nevertheless a condition for the acquisition of the stock. As such, postpetition interest was required in order to satisfy the terms of the judgment.

Whether postpetition interest is allowed in this instance is dependent upon how the state court judgment is characterized. Plaintiffs emphasize the intertwined nature of the obligations set forth in the state court judgment—the latter obligation creating the terms that property can be acquired.

The debtors, in contrast, characterize the stock surrender requirement as merely ministerial and incidental to the payment of the claim. They contend that the filing of proofs of claim constitutes the plaintiffs' agreement to be bound by the bankruptcy court's exclusive authority to allow or disallow a claim. Consequently, debtors contend, payment pursuant to the chapter 11 plan satisfies the plaintiffs' claims under the state court judgment, including the requirement that plaintiffs surrender the stock, notwithstanding the disallowance of postpetition interest under § 502(b).

We conclude the bankruptcy court did not err in construing the state court judgment as constituting a judicially prescribed sale of stock. Plaintiffs were allowed to present their case to the jury in state court on the express condition that they agree to surrender their stock in exchange for the amount of the damages award. Hence, the compensatory damages award is more than a mere unsecured debt that ordinarily would be discharged by payment of the entire allowed amount of plaintiffs' claim through the chapter 11 plans.

The judgment requires the surrender of the stock only upon payment or tender of the $461,838,000, together with accrued interest at the judgment rate of 10 percent per year and taxable costs, until paid. E.R. 00018. This

right to acquire the property of another (i.e., AMERCO stock) is strictly a creature of state law. *See Morton v. Nat'l Bank of New York (In re Morton)*, 866 F.2d 561, 563-64 (2d. Cir. 1989). Under state law, "[t]he party who claims the benefit of a judgment rendered in his favor must comply with any terms or conditions which it imposes on him, and failure to do so will destroy the effect of the adjudication." 50 C.J.S. *Judgments* § 545 (1997) (citations omitted).

Although the allowed claims (principal and prepetition interest) may have been satisfied for purposes of bankruptcy law, that does not dispose of the entire judgment. The terms set forth in the state court judgment as a condition for the stock transfer required payment of interest at 10 percent.

While liens may indeed be diminished through a chapter 11 plan, property that does not belong to the bankruptcy estate, such as the plaintiffs' shares of stock, may not be diminished. A debtor cannot use bankruptcy to deprive a creditor of its state law property rights. *In re Wetzler*, 192 B.R. 109, 117-18 (Bankr. D. Md. 1996). Here, the plaintiffs own about 47 percent of the common stock of AMERCO, which is a very significant property right. Thus, the bankruptcy court correctly held that postpetition judgment interest, although such interest would be disallowed if the debts are dischargeable, was nevertheless required to effectuate the terms of the sale of stock.

In addition, the bankruptcy court correctly held that debtors' insolvency was irrelevant because even if debtors were insolvent, postpetition interest is nevertheless required to satisfy the peculiar terms of the state court judgment's stock surrender provision.[10]

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[10] As we discuss later in this Memorandum, the bankruptcy court could reasonably have concluded that the debtors were all solvent

II.

The plaintiffs concede in their cross-appeal that they stipulated to accept the payment under the plan and the payment into the escrow account in lieu of full payment of the state court judgment with interest through the actual date of the last payment. Plaintiffs' counsel says that the stipulation was the result of a "late night," and wants to be excused from the agreement so that interest may be claimed for periods after the escrow account was funded.

Although the plaintiffs' appellate brief contends that the bankrutcy court erroneously failed to consider a written stipulation entered into between the parties on March 6, 1996, when it confirmed the Second Amended and Restated Debtors' Plan of Reorganization, plaintiffs' counsel abandoned that point at oral argument by conceding that the written document was not the final deal.

In light of these concessions, we understand the gravamen of the cross-appeal to be that the plaintiffs should be excused from a bad decision even though the bankruptcy court did not err in its finding of fact that the plaintiffs agreed that the deposit of postpetition interest into the escrow account satisfied the stock surrender provision of the state court judgment.

In March 1996, the Second Amended And Restated Debtor's Plan of Reorganization was confirmed subject to three modifications. Section A. (ii) states the following pertinent modification:

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as a result of AMERCO's indemnification obligation. If the debtors were solvent, then (even if the bankruptcy court were to be held to have erred in concluding that there was a judicially-mandated sale of stock, or if the debts were to be found to be dischargeable) interest would accrue at the federal judgment interest rate pursuant to 11 U.S.C. § 726(a)(5). However, because the bankruptcy court did not decide this issue, we merely note its presence on the landscape.

> (ii) Subsection (b) of Section 2.26A, which is the Section defining the Escrow Account, is supplemented to provide that the amount(s) required to be escrowed will be determined pursuant to a separate order of the Bankruptcy Court—all as provided in the "*Reporter's Transcript Of Proceedings*," dated March 6, 1996, which the Debtor filed with the Bankruptcy Court at the March 7, 1996 session of the Confirmation Hearing. Such separate order of the Bankruptcy Court (including any appeal(s) thereof) will not affect the finality of this Confirmation Order or the provisions of the Plan regarding the payments of the unpaid Share Case Claims and the surrenders or transfers of the Shareholder Plaintiffs' AMERCO common stock to AMERCO as the Debtor's designee.

Order Confirming Plan, E.R. 00763-000764.

Additionally, subsection (b) of section 2.26A of the Second Amended And Restated Plan states: "If the Bankruptcy Court orders that post-Petition Date interest must be paid under the Share Case Judgment on the unpaid Share Case Claims, AMERCO will deposit cash in the Escrow Account sufficient to pay such post-Petition Date interest." *Id.* at E.R. 00790.

Plan section 2.49 provides that the Effective Date Payoff (which is separate from the Escrow Account deposited) constitutes full settlement and satisfaction of the Share Case Claims which are defined to include the Share Case Judgment.

As noted, plaintiffs contended in their brief that the bankruptcy court erroneously failed to consider the purported stipulation that they say was entered into by the parties when it confirmed the plans of reorganization. Essentially, plaintiffs initially argued on appeal that they

only agreed to withdraw their objections to confirmation of debtors' plans upon compliance with the terms of the purported stipulation set forth in a March 6, 1996, letter on Osborn Maledon stationery. Appellees' Supplemental Excerpts of Record ("Supp. E.R.") 00186-00197.[11]

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[11] The March 6, 1996 letter states the pertinent terms of the purported stipulation:

> The unpaid Share Case Plaintiffs contend that the Debtors have not correctly calculated the amount of interest to be paid on the Share Case Judgment. The unpaid Share Case Plaintiffs contend that the Effective Date Payoff cannot be applied first to the principal amount of the Share Case Judgment and must be applied first to interest accrued on the Share Case Judgment. Therefore, the unpaid Share Case Plaintiffs contend that, on and after the Effective Date, there will be a balance of the Share Case Judgment remaining upon which interest will continue to accrue at the rate of 10% per annum while the Debtors are appealing the Bankruptcy Court's ruling on interest (the "Unpaid Balance").
>
> The Debtors and AMERCO contend that the Effective Date Payoff as applied pursuant to the Plan is proper, and that, upon the payment to the unpaid Share Case Plaintiffs of the Effective Date Payoff and the deposit into the Escrow Account, the balance of the Share Case Judgment is satisfied in full.
>
> The unpaid Share Case Plaintiffs, the Debtors and AMERCO agree to submit this issue to the Bankruptcy Court for determination after confirmation of the plans. If the Bankruptcy Court decides that there is an Unpaid Balance upon which interest continues to accrue, the Debtors and AMERCO agree, on an annual basis, to deposit into the Escrow Account additional sums accrued on the Unpaid Balance. The amount to be deposited on an annual basis will be an amount equal to the difference between the interest or other income received on the funds in the Escrow Account and the accrued interest at the rate of 10% per annum on the Unpaid Balance.
>
> The Escrow Account will continue to be held, administered and distributed in accordance with the Plan. The issues reserved pursuant to the Plan will include *both* whether post-Petition Date interest must be paid at all *and*, if so, the correct computation thereof in light of the dispute described above.

Supp. E.R. 00195-00196.

On March 7, 1996, the day after the parties entered into the stipulation, a plan confirmation hearing was held. The plaintiffs' counsel, at oral argument before us, admitted that the purported stipulation was not included in the plan and that this was no mistake. The court subsequently confirmed debtors' Second Amended and Restated Plans of Reorganization, subject to the above-stated modifications. The court noted that the plaintiffs withdrew their objection to confirmation of the plan pursuant to the record established by the "*Reporter's Transcript Of Proceedings*," dated March 6, 1996. E.R. 00765. However, the Order Confirming Plan does not refer to the purported stipulation. Indeed, in the March 6, 1996, proceeding in the bankruptcy court in which the settlement was announced, there was a colloquy in which AMERCO insisted, notwithstanding the plaintiffs' March 6 letter, that the terms of the plans control and were not to be modified. The plaintiffs, through counsel, agreed. Supp. E.R. 00192, at lines 2-24.

Consequently, pursuant to a Hearing On Post-Petition Interest On The Unsecured Share Case Judgment Under The Debtors' Confirmed Plans And Escrow Requirements of Plans, on July 19, 1996, the bankruptcy court held, orally on the record, that the plaintiffs stipulated to the terms of the confirmed plans in which the deposit of interest that accrued through the effective date of the plans or payment satisfied the terms of the state court judgment. The bankruptcy court found that there is no requirement that AMERCO must make periodic payments to keep the earned interest on the escrowed funds at a figure equaling 10 percent per annum, which is the judgment rate. E.R. 01139-01143.

Finally, in its Order Adjudicating: (1) The Reorganized Debtors' Obligations To Pay Postpetition Date

Interest On The Respective Share Case Judgment Principal Accounts; And (2) The Proper Calculation Of The Escrow Account, the bankruptcy court held that:

> [t]he Escrow Account established pursuant to the Reorganized Debtors' confirmed Plans shall be, and hereby is, determined to be funded fully with respect to each of [the plaintiffs' classes] under the Plans when each of the respective amounts of Post-Petition Date Interest accrued on the respective Share Case Judgment Principal Amounts is deposited in the Escrow Account. Thereafter, the Reorganized Debtors shall not be obligated to pay any additional interest on the respective fully paid Share Case Judgment Principal Amounts or on the escrowed Post-Petition Date Interest, *provided, however, that* any interest earned on the escrowed funds shall be held and administered as part of the Escrow Account and disbursed to the party ultimately and finally adjudicated to be entitled to the escrowed funds in accordance with Section 2.26A of the confirmed Plans.

E.R. 01195.

Plaintiffs' counsel, as noted, repeatedly conceded during oral argument that the plaintiffs agreed to accept the $55 million in the escrow account plus any accrued interest in the account, in lieu of payment of interest pursuant to the state court judgment rate, in the event that plaintiffs were successful on appeal. Plaintiffs' counsel further admitted that the purported stipulation was not included in the plan of reorganization. However, he argued that we should consider all of the documents as a whole (including the purported stipulation), and not just the confirmed plans, as a proper reflection of the intent of the parties. Essentially, plaintiffs' counsel desires to be released from the terms of the confirmed plan because, in working ex-

tended hours to hammer out an agreement, he was tired, and inadvertently failed to include the terms of the purported stipulation in the plans of reorganization.

The existence and substance of the agreement is important because parties are permitted, as a matter of freedom of contract, to allocate payments on a judgment in a manner different than the presumptive rule of interest first. The plaintiffs have now conceded that they did agree to apply the Effective Date Payment to full payment of principal and to accept the money eventually deposited in the Escrow Account, together with earnings on that account, in lieu of interest at the 10 percent Arizona judgment rate that would otherwise have continued to apply to the Escrow Account on the theory that its contents were unpaid principal.

The argument raises what is fundamentally a question of fact for the bankruptcy judge: the terms of what was actually agreed in the proceeding that occurred before the judge. He understood the context and the positions of the parties and observed the "give and take." Because the bankruptcy court had a more complete record of the documents and negotiations between the parties, we do not conclude as a matter of fact or of law that the bankruptcy court erred in its conclusion that the plaintiffs agreed to accept interest accruing in the escrow account in lieu of interest at the state court judgment rate.

III.

A.

Having determined that interest continued to accrue postpetition but that the payment of the judgment principal and the deposit into the escrow account stopped the accrual of interest on the judgment, the question becomes the applicable rate of interest.

The Ninth Circuit applies applicable state law interest rates absent federal preemption. Several courts have held that the state post-judgment interest rate applies in diversity jurisdiction. *See United States v. 1980 Lear Jet, Model 35A, Serial Number 277*, 38 F.3d 398, 401-02 (9th Cir. 1994) (upholding Arizona's mechanics' lien law's pre and post-judgment interest rate of 10 percent per year); *International Telemeter. Corp. v. Hamilin Int'l Corp.*, 754 F.2d 1492, 1494-95 (9th Cir. 1985) (holding that state law governs interest rate on judgment in diversity case). Bankruptcy is no different.

Thus, Arizona's 10 percent interest rate continued to apply until the money was deposited into the escrow account. The bankruptcy court did not err in this respect.

B.

Finally, we note that postpetition interest on the principal owed on a judgment of a state court can be supported on three, independent theories that potentially apply in this case.

1.

First, interest at the state's judgment interest rate is warranted, as here, when the peculiar circumstances of the judgment give it a character that transcends the status of a mere money judgment. We conclude in this appeal that the bankruptcy court was correct in concluding that this theory applies in this case.

2.

Second, interest at the state's judgment interest rate continues to accrue postpetition on nondischargeable debts. *Cf. Bruning v. United States*, 376 U.S. 358, 360 (1964) (Bankruptcy Act). Nondischargeability actions are still pending in the bankruptcy court. If the debts were to be held in that litigation to be nondischargeable (and the jury's verdict strongly suggests nondischarge-

ability), then the interest that the bankruptcy court determined to be the amount required to be deposited into the escrow account under the plans of reorganization would have been calculated correctly even if our conclusion today affirming the bankruptcy court were to be subsequently reversed. And the plaintiffs' agreement to accept the escrow account in lieu of continued accrual or interest would, unless similarly reversed, continue to apply.

3.

Third, postpetition interest at the federal judgment interest rate would apply to the extent that the individual bankruptcy estates are solvent estates. When available funds are sufficient to pay all claims and expenses in full, then interest must be paid in a chapter 7 liquidation at the legal rate from the date of the filing of the petition. 11 U.S.C. § 726(a)(5).[12]

Whether these estates are solvent remains an unresolved question that boils down to the effect of AMERCO's agreements to indemnify the debtors. If the indemnification agreements are given full value for the amounts that AMERCO actually funded under the plan, then the bankruptcy estates (net of exempt assets) are solvent in the approximate amount of $106.25 million.

AMERCO, contending that the estates were insolvent, insists that its indemnification agreements were worthless and asserts that, during the original hearing on confirmation of the plans of reorganization (which plans the bankruptcy judge refused to confirm), it paraded in a number of witnesses who opined without contradiction that AMERCO was not able to make good on an indemnification obligation of $461.84 million. AMERCO persisted

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[12] Although the statute refers to the "legal rate" of interest, it is commonly understood that this means the federal judgment rate. 6 COLLIER ON BANKRUPTCY ¶ 726.02[5] (Lawrence P. King, et al., eds., 15th ed. rev. 1997).

in this assertion on oral argument even though it did in fact manage to find a way to come up with the funds once the plans were confirmed.

The bankruptcy court does not appear to have made a formal finding on the question of the debtors' solvency and, in any event, would have been entitled to disbelieve AMERCO's opinion evidence. At the time of the actual confirmation of the consensual plans, this testimony would have been even more doubtful because AMERCO was actually paying the full amount of the judgment interest. That the bankruptcy judge did not think he had decided that question was evident in his ruling in the subsequent proceeding on the interest question when he began his analysis with the phrase, "Assuming arguendo that the debtors are insolvent." E.R. 01140, lines 4-5.

Thus, if the conclusion that Arizona's judgment interest rate applies is incorrect on either of the theories that are potentially applicable, then it would be appropriate to remand to the bankruptcy judge for a formal finding on whether the estates were solvent in order to determine whether interest was required to be paid postpetition at the federal judgment interest rate.

CONCLUSION

In sum, we AFFIRM the bankruptcy court's holding that defendants are required to pay postpetition interest to satisfy the stock surrender provision of the Arizona court judgment and its determination of the correct amount.

Similarly, we AFFIRM the bankruptcy court's holding that plaintiffs stipulated to accept the escrow account and interest accrued in the account in satisfaction of the Arizona court judgment.

APPENDIX B

[Filed Jun. 18, 1999]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 97-17369

BAP No. AZ-96-01884-K1JoRy

IN RE: EDWARD J. SHOEN; IN RE: JAMES P. SHOEN;
IN RE: AUBREY JOHNSON; IN RE: JOHN DODDS;
IN RE: WILLIAM CARTY,
Debtors,

EDWARD J. SHOEN; JAMES SHOEN; AUBREY JOHNSON;
JOHN M. DODDS; WILLIAM CARTY; AMERCO,
Appellants,

v

SAMUEL W. SHOEN; CECILIA M. HANLON, a/k/a
CECILIA M. SHOEN-HANLON; KATRINA CARLSON, a/k/a
KATRINA SHOEN-CARLSON; SAMWILL, INC.;
KATTYDID INC.; MICKL, INC.,
Appellees.

No. 98-15455

IN RE: EDWARD J. SHOEN; JAMES P. SHOEN;
AUBREY JOHNSON; JOHN DODDS; WILLIAM CARTY,
Debtors,

SAMUEL W. SHOEN; CECILIA M. HANSON, a/k/a CECILIA M. SHOEN-HANSON; KATRINA CARLSON, a/k/a KATRINA SHOEN-CARLSON; SAMWILL, INC., now called Katabasis International, Inc.; CEMAR, INC.; KATTYDID, INC.; MICKL, INC.,

Appellants,

v.

EDWARD J. SHOEN; JAMES SHOEN; AUBREY JOHNSON; JOHN M. DODDS; WILLIAM CARTY; AMERCO

Appellees.

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC

Before: FERNANDEZ and McKEOWN, Circuit Judges, and WEINER [1], District Judge.

Judges Fernandez and Weiner have voted to deny appellants' petition for rehearing. Judge McKeown would grant the petition for rehearing.

The suggestion for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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[1] Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

95-01430-PHX-JMM
95-01434-PHX-JMM

IN RE. EDWARD J. SHOEN, *et al.* CH. 11
HEARING: POST-PETITION INTEREST ON THE UNSECURED SHARE CASE JUDGMENT UNDER THE DEBTORS' CONFIRMED PLANS AND ESCROW REQUIREMENTS OF PLAN

July 19, 1996
1:39 p.m.

BEFORE THE
HONORABLE JAMES M. MARLAR, Judge

* * * *

[3] THE CLERK: Item number 21 on the Phoenix calendar, *Edward Shoen*, 95-1430-PHX-JMM, hearing on post-petition interest on the unsecured Share Case Judgment under the debtors' confirmed plan and escrow requirements of plan.

* * * *

[23] THE COURT: Yeah. All right. Having read everything, I'm ready to rule. Are you ready?

Okay. The Court has considered the arguments of counsel, the pleadings, the entire record in this matter, including but not limited to the confirmed reorganization plans and my memorandum decisions of January 26th, 1996, which was amended and restate[d] as of March 4th, 1996.

I'm not going to restate the contents of either the January 26 or March 4th memorandum decisions, but I do want to incorporate them herein by reference, adopt them and ratify them in full as [if] they're fully restated herein. [24] Because I believe the reasoning set forth in those decisions is dispositive of the primary issue here.

First let me address the issue of the debtors' obligation to pay post-petition interest. Assuming arguendo that the debtors are insolvent, the Court agrees with the debtors that they are not required to pay post-petition interest in order simply to discharge the unsecured judgment claims of the Share Case Plaintiffs.

However, since the debtors' plan[s] compel the Share Case Plaintiffs to surrender their AMERCO common stock pursuant to the Share Case Judgment, then the defendants must comply with that judgment and pay the interest, both pre- and post-petition. The Share Case Judgment of February 21st, 1995, signed by the Honorable Thomas Dunevant of the Maricopa County Superior Court, provided, and I quote:

> "Upon payment or tender of the total dollar amount set forth above, $461,838,000, together with accrued interest and taxable costs, all plaintiffs' share of AMERCO common stock identified above shall be transferred to defendants or their designees."

Because the confirmed plan contemplates the surrender of the stock, it is ordered that the debtors must pay post-petition interest on the Share Case Judgment since the plans provide [25] that the debtors intend to acquire the AMERCO stock held by the Share Case Plaintiffs. This is what the Maricopa County Share Case Judgment requires as a condition of forcing others to part with their property. The question of the debtors' solvency is irrelevant to this holding.

To summarize this first issue then the Court holds:

First, the plans of reorganization which have been confirmed, pursuant to a stipulation of the parties, provides for the surrender of the AMERCO common stock held by the remaining Share Case Plaintiffs. In order to consummate this plan, the debtors must pay the value of the stock, which was determined by the February 21st, 1995 judgment to be $461,838,000, plus interest at 10 percent from February 14th, 1995 to the date of payment. Naturally, any reductions by payment previously made must be taken into consideration in such a calculation.

Second, the debtors cannot have it both ways. They cannot, as a matter of law, pay less to acquire another's property than the amount set forth in paragraph two, page three of the Share Case Judgment of the Maricopa County Superior Court.

* * * *

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In Proceedings Under Chapter 11

Case No. 95-1430-PHX-JMM
(Jointly Administered Under This Case Number)

IN RE: EDWARD J. SHOEN,
Debtor.

Case No. 95-1431-PHX-JMM

IN RE: JAMES P. SHOEN,
Debtor.

Case No. 95-1432-PHX-JMM

IN RE: AUBREY K. JOHNSON,
Debtor.

Case No. 95-1433-PHX-JMM

IN RE: JOHN M. DODDS,
Debtor.

Case No. 95-1434-PHX-JMM

IN RE: WILLIAM E. CARTY,
Debtor.

ORDER ADJUDICATING: (1) THE REORGANIZED DEBTORS' OBLIGATIONS TO PAY POST-PETITION DATE INTEREST ON THE RESPECTIVE SHARE CASE JUDGMENT PRINCIPAL ACCOUNTS; AND (2) THE PROPER CALCULATION OF THE ESCROW ACCOUNT

Date of Hearing: July 19, 1996
Time of Hearing: 1:30 p.m.
Place of Hearing: Tucson

The matters adjudicated in this Order came on for hearing before the Court at the above-stated date, time, and place. Counsel appeared for all interested parties as shown in the transcript of the hearing.

For purposes of this Order, there will be the following defined terms:

A. *Affected Share Case Plaintiffs.* This term will refer to and mean the respective Share Case Plaintiffs whose Share Case Claims had not been fully settled or paid in full before the Confirmation Date of the Reorganized Debtors' confirmed Plans and are being paid as provided in those Plans with respect to Classes 3B, 3C, 3E, and 3G.

B. *Share Case Judgment Principal Amounts.* This term will refer to and mean the respective dollar amounts awarded to the Affected Share Case Plaintiffs under paragraph 1 of the Share Case Judgment.

C. *Post-Petition Date Interest.* This term will refer to and mean interest awarded under paragraph 3 of the Share Case Judgment at the rate of ten percent (10%) per year accruing on the respective Share Case Judgment Principal Amounts from February 21, 1995 (the Petition Date) to and including each date on which the re-

spective Share Case Judgment Principal Amounts are paid in full as part of the Share Case Plaintiffs' Effective Date Payoff to the respective Affected Share Case Plaintiffs.

D. *Incorporation Of Confirmed Plans' Defined Terms.* Except for the capitalized terms expressly defined in this Order, all capitalized defined terms which appear in this Order (including, but not limited to, the capitalized defined terms used in the body of each of the definition provisions of this Order) will have the same meanings defined in the Reorganized Debtors' Plans as confirmed by the Confirmation Orders entered by the Bankruptcy Court on March 15, 1996.

NOW, THEREFORE, pursuant to the foregoing and based upon the Bankruptcy Court's ruling announced on the record in open court pursuant to Bankruptcy Rule 7052; and good cause appearing,

IT IS HEREBY ORDERED as follows:

1. The Reorganized Debtors shall be, and hereby are, determined to be obligated to pay Post-Petition Date Interest on the respective Share Case Judgment Principal Amounts awarded to the respective Affected Share Case Plaintiffs.

2. The Escrow Account established pursuant to the Reorganized Debtors' confirmed Plans shall be, and hereby is, determined to be funded fully with respect to each of the Classes 3B, 3C, 3E, and 3G under the Plans when each of the respective amounts of Post-Petition Date Interest accrued on the respective Share Case Judgment Principal Amounts is deposited in the Escrow Account. Thereafter, the Reorganized Debtors shall not be obligated to pay any additional interest on the respective fully paid Share Case Judgment Principal Amounts or on the escrowed Post-Petition Date Interest, *provided, however,*

that any interest earned on the escrowed funds shall be held and administered as part of the Escrow Account and disbursed to the party ultimately and finally adjudicated to be entitled to the escrowed funds in accordance with Section 2.26A of the confirmed Plans.

3. This Order is intended by the Bankruptcy Court to be a final order which is subject to being appealed. In this regard, the Court expressly determines that there is no just reason for delay and expressly directs the entry of this Order as a final order.

DATED: Sept. 6, 1996

/s/ James M. Marlar
HONORABLE JAMES M. MARLAR
United States Bankruptcy Judge

APPROVED AS TO FORM BY:

STREICH LANG
A Professional Association

By: /s/ John J. Dawson
JOHN J. DAWSON
SUSAN G. BOSWELL
RONALD E. REINSEL
Attorneys for Edward J. Shoen,
James P. Shoen, Aubrey K. Johnson,
and John M. Dodds,
Reorganized Debtors

MESCH, CLARK & ROTHSCHILD, P.C.

By: /s/ Lowell E. Rothschild *
LOWELL E. ROTHSCHILD
EILEEN HOLLOWELL
Attorneys for William E. Carty,
Reorganized Debtor

LAW OFFICE OF MICHAEL W. CARMEL

By: /s/ Michael W. Carmel *
MICHAEL W. CARMEL
Attorneys for AMERCO

OSBORN MALEDON, P.A.

By: /s/ C. Taylor Ashworth
C. TAYLOR ASHWORTH
Attorneys for the Affected
Share Case Plaintiffs

* Signed with their permission
By /s/ John J. Dawson

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543-0001

September 2, 1999

Mr. John Roberts
Hogan & Hartson
555 Thirteenth Street, NW
Washington, DC 20004

Re: Edward J. Shoen, et al.
v. Samuel W. Shoen, et al.
Application No. A-188

Dear Mr. Roberts:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on September 2, 1999, extended the time to and including October 18, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER
Clerk

By /s/ Sandra Elliott Spagnolo
SANDRA ELLIOTT SPAGNOLO
Assistant Clerk

APPENDIX F

11 U.S.C. § 502. Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of—

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection

with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide.

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured, the claim of a creditor, to the extent that—

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

Supreme Court, U.S.
FILED
NOV 17 1999
CLERK

No. 99- 662

IN THE

Supreme Court of the United States

EDWARD J. SHOEN, *et al.*,

Petitioners,

v.

SAMUEL W. SHOEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an Arizona state court judgment that required Respondents to transfer stock to Petitioners upon the payment of $461,838,000, together with accrued interest and costs, was properly characterized by the Court of Appeals, the Bankruptcy Appellate Panel, and the Bankruptcy Court as a judicially mandated sale of stock, as opposed to an unsecured debt?

RESPONDENTS' RULE 29.6 STATEMENT

The corporate respondents have no parent corporations, and no publicly-held company owns ten percent or more of their stock.

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Cases:

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In re Seal, 192 B.R. 442 (W.D. Mich. 1996) 5, 6, 7

In re Twin Parks Ltd. Partnership, 720 F.2d 1374 (4th Cir. 1983) 6

In re United States Lines, Inc., 199 B.R. 476 (Bankr. S.D.N.Y. 1996) 5

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Rowland v. Rand, 154 F.3d 952 (9th Cir.), *cert. denied*, 67 U.S.L.W. 3561 (1999) 8

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11 U.S.C. § 502(b)(2) 2, 3, 5, 6

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United States Supreme Court Rule 10(a) 7

Respondents Samuel W. Shoen, Cecilia M. Hanlon (aka Cecilia M. Shoen-Hanlon), Katrina Carlson (aka Katrina Shoen-Carlson), Michael Shoen, Sawmill Inc. (now called Katabasis International, Inc.), Cemar, Inc., Kattydid, Inc., and Mickl, Inc. respectfully request the Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Petition omits the published opinion of the United States Bankruptcy Court for the District of Arizona, reported at 192 B.R. 442 (D. Ariz. 1996). The Bankruptcy Court incorporated that opinion by reference into the order from which Petitioners appealed. (*See* Pet. App. 39a-41a.)

STATEMENT OF THE CASE

In 1995, after years of litigation, the Arizona Superior Court entered an innovative and unusual judgment (the "Judgment") against Petitioners for, *inter alia*, breaching their fiduciary duties to Respondents. The Judgment required Respondents to transfer their stock in AMERCO to Petitioners upon payment of $461,838,000, together with "accrued interest and taxable costs." Rather than pay that amount and acquire Respondents' stock, Petitioners filed a Chapter 11 bankruptcy petition and submitted several reorganization plans. Each of these plans sought to discharge Petitioners' monetary obligations to Respondents by paying less than the amount specified in the Judgment *and* to acquire Respondents' stock. Put differently, Petitioners sought to use the Bankruptcy Court proceedings to acquire Respondents' stock without complying with the Judgment's terms.

The Bankruptcy Court rejected Petitioners' "have-your-cake-and-eat-it-too" approach, reasoning that simply discharging "the monetary obligation imposed by the Judgment does not entitle the [Petitioners] to require that the [Respondents] transfer their AMERCO common stock to the [Petitioners]." *Shoen v. Shoen*, 193 B.R. 302, 315 (D. Ariz. 1996). Petitioners could only acquire *new* property in bankruptcy, the Bankruptcy Court explained, in accordance with applicable state law. In this case, the Judgment set forth the applicable state law. *Id.* at 316-17.

Petitioners eventually conceded that to acquire the AMERCO stock, they would need to pay Respondents $461,838,000. Petitioners argued, however, relying on 11 U.S.C. § 502(b)(2), that they could acquire the stock without complying with the Judgment's interest terms. The Bankruptcy Court rejected this argument for the same reasons it rejected Petitioners' original plans: if Petitioners wanted to acquire the AMERCO stock pursuant to the Judgment, they were required to comply fully with all the Judgment's terms "and pay the interest, both pre- and post-petition." (Pet. App. 40a.)

The Bankruptcy Appellate Panel ("BAP") affirmed, explaining that while postpetition interest is not available in Chapter 11 in connection with an unsecured judgment debt, in this case interest was "nevertheless required to effectuate the terms of the sale of stock." *Shoen v. Shoen*, 176 F.3d 1150, 1162 (9th Cir. 1999) (Pet. App. 27a). The Ninth Circuit affirmed the BAP decision, adopted the BAP's reasoning, and attached the BAP's opinion to its own. *See id.* at 1151 & n.2 (Pet. App. 3a).

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT RAISE ANY ISSUES WARRANTING SUPREME COURT REVIEW.

This case is not about whether a Chapter 11 creditor may collect post-petition interest on an unsecured claim under 11 U.S.C. § 502(b)(2). Everyone — including the seven judges that previously addressed this case — agrees that Section 502(b)(2) does not generally permit such interest to accrue. *See, e.g., Shoen*, 176 F.3d at 1161 (Pet. App. 25a) (explaining that Respondents acknowledge that "interest accruing on a postpetition, unsecured debt is generally disallowed in bankruptcy under § 502(b)(2)."). Everyone further agrees that money judgments generally constitute unsecured claims, and that if Petitioners had sought simply to discharge the monetary obligations imposed by the Judgment, Respondents would not be entitled to post-petition interest. *See Shoen*, 193 B.R. at 315 (explaining that the "courts also recognize that a money judgment against a debtor creates a 'claim' under the judgment that falls within the scope of [the] Bankruptcy Code. . . ."). The Ninth Circuit's decision challenges none of these basic bankruptcy principles.

Rather than raising bankruptcy issues of widespread application, this case instead involves the unique question whether the particular state court judgment entered by the Arizona Superior Court should, in the context of Petitioners' bankruptcy reorganization plans, be treated as a judicially-mandated sale of stock, or rather as an unsecured claim. Six of the seven judges who have examined this issue below agreed that this particular Judgment is best characterized as a judicially-mandated sale of stock — and for good reason.

Although the Judgment is admittedly "rather unusual," *Shoen*, 176 F.3d at 1151, it plainly does more than impose a monetary obligation on Petitioners; it requires Respondents to sell Petitioners their stock at a judicially-mandated price. Bankruptcy looks to state law to determine the nature and extent of a debtor's property interests, and transfers such interests intact to the bankruptcy estate. *See Butner v. United States*, 440 U.S. 48, 55 (1979); *Fisher v. Apostolov*, 155 F.3d 876, 880 (7th Cir. 1998); *Coupon Clearing Serv., Inc. v. Foothill Capital Corp.*, 113 F.3d 1091, 1099 (9th Cir. 1997). The property interests transferred to the bankruptcy estate are fixed, and may not be enlarged, enhanced, or altered by the bankruptcy court. *See Coupon*, 113 F.3d at 1099.

Before filing their Chapter 11 petition, Petitioners did not own Respondents' AMERCO stock. Accordingly, Petitioners' bankruptcy estate did not include Respondents' AMERCO stock. Petitioners could have sought in the bankruptcy proceedings simply to discharge Respondents' monetary claims under the Judgment, and thus avoided "the debt obligation to pay post-petition interest." *Shoen*, 193 B.R. at 317. But instead, Petitioners sought to *acquire* Respondents' AMERCO stock. The Bankruptcy Court, BAP, and Ninth Circuit correctly held that if Petitioners wanted to acquire Respondents' AMERCO stock, they could only do so by complying with the only state law granting them a right to acquire such stock — the Judgment. Even in bankruptcy, one may not acquire new property without paying the seller the amount he is entitled to for the property under state law.

In this case, the applicable state law — the Judgment — required Petitioners to pay interest. Thus, the Ninth Circuit's opinion is correct. In any event, since the decision below

turns on the interpretation of an "unusual" state court judgment, it poses no issues worthy of Supreme Court review. *See* Rule 10, Rules of the Supreme Court of the United States ("A petition for review is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

II. THE OPINION BELOW DOES NOT CONFLICT WITH DECISIONS FROM OTHER COURTS.

Petitioners maintain that the Ninth Circuit's decision: (1) conflicts with decisions of other courts that have held that Section 502(b)(2) precludes post-petition interest from accruing on judgments; (2) carves out a new exception under Section 502(b)(2) in conflict with the Seventh and Fourth Circuits; and (3) is contrary to the holding of *In re Seal*, 192 B.R. 442 (W.D. Mich. 1996). (Pet. at 12-18.)

Each of these arguments fails. In light of the highly case-specific nature of this matter, the Ninth Circuit's decision conflicts with no other reported decision. As the Bankruptcy Court observed, "the Debtors have not referred this Court to a single case involving similar facts, and this Court has been unable to locate any through independent research." 193 B.R. at 314.

a. The decisions involving judgments on which Petitioners rely — *Bursch v. Beardsley & Piper*, 971 F.2d 108 (8th Cir. 1992), *In re United States Lines, Inc.*, 199 B.R. 476 (Bankr. S.D.N.Y. 1996), and *In re Fifth Ave. Jewelers, Inc.*, 203 B.R. 372 (Bankr. W.D. Pa. 1996) — all involved ordinary money judgments and the straightforward application of Section 502(b)(2). In none of these cases did

the debtors attempt to acquire new property from another without complying with the state law governing the property's acquisition. None of these cases posed the issue whether the judgments constituted an unsecured claim, nor did these cases include the proper characterization of a state court judgment. Thus, the general rule recognized in these cases remains alive and well in the Ninth Circuit, and is in no way impacted by this case. *See Shoen*, 176 F.3d at 1161; *Great Lakes Higher Educ. v. Pardee*, No. 98-15942, 1999 WL 965651, *1 (9th Cir. Oct. 25, 1999) (acknowledging the general rule that Section 502(b)(2) precludes postpetition interest on unsecured claims).

b. Petitioners' contention that the Ninth Circuit's decision creates an *exception* to Section 502(b)(2), thereby conflicting with *In the matter of Fesco Plastics Corp.*, 996 F.2d 152 (7th Cir. 1993) and *In re Twin Parks Ltd. Partnership*, 720 F.2d 1374 (4th Cir. 1983), is equally unavailing. The courts in those cases refused to establish certain new exceptions to Section 502(b)(2). However, the issue *whether* Section 502(b)(2) applied — thereby requiring an exception — was not posed by those cases. Furthermore, those cases did not involve a debtor's attempt to acquire new property from another. The Ninth Circuit did not create an exception to Section 502(b)(2) here; it held that Section 502(b)(2) did not apply to the Judgment because of the Judgment's particular nature and how Petitioners sought to treat it. *Shoen*, 176 F.3d at 1151 (Pet. App. 26a-27a).

c. The decision below does not conflict with *Seal*. In *Seal* the debtor had acquired the property in issue — an automobile — *before* filing bankruptcy. The creditor, however, improperly and illegally refused to transfer title. 192 B.R. at 453 & n.15. The bankruptcy court ordered the

Michigan Secretary of State to issue a replacement title, *id.* at 448, sanctioned the creditor, *id.* at 456, and offset that sanction against what the debtor owed the creditor for the creditor's claim, *id.* at 457. Because the offset extinguished the creditor's claim, the debtor now owned the vehicle "free and clear." *Id.* at 458.

Because the *Seal* debtor had acquired the vehicle before filing bankruptcy, the vehicle became part of the bankruptcy estate at the time of filing. *Seal* did not involve a debtor's attempt to obtain new property in bankruptcy while circumventing applicable state law.

In any event, even if the Ninth Circuit's decision conflicted with a single case from the Bankruptcy Court of the Western District of Michigan, this Court's review would not be warranted. *See* Rule 10(a), Rules of the Supreme Court of the United States (review may be appropriate when Court of Appeals decides an "important matter" in conflict with decisions of other Court of Appeals).

III. THE FACT THAT THIS CASE ARISES FROM THE NINTH CIRCUIT IS NO REASON TO GRANT THE PETITION FOR CERTIORARI.

Petitioners' final argument is that since this case involves an example of the Ninth Circuit's "novel" application of law, the Court should grant the Petition. (Pet. App. at 19.) But it is the highly unusual circumstances of this case that are novel, not the Ninth Circuit's application of law. This Court has not adopted a rule providing for heightened scrutiny of petitions for certiorari for Ninth Circuit decisions; it routinely and correctly denies such petitions when they do not present issues meriting the grant of certiorari. *See, e.g., Jensen v.*

Internal Revenue Serv., 165 F.3d 916 (9th Cir.), *cert. denied*, 67 U.S.L.W. 3784 (1999); *Pellegrino v. Fanter*, 163 F.3d 607 (9th Cir.), *cert. denied*, 67 U.S.L.W. 3784 (1999); *Rowland v. Rand*, 154 F.3d 952 (9th Cir.), *cert. denied*, 67 U.S.L.W. 3561 (1999).

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Petitioners,

v.

SAMUEL W. SHOEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents concede that "[e]veryone * * * agrees that Section 502(b)(2) does not generally permit" postpetition interest on unsecured claims. Opp. 3. They also concede that "[e]veryone further agrees that money judgments generally constitute unsecured claims." Opp. 3. But in a twist worthy of an O. Henry short story, respondents conclude that they *are* entitled to postpetition interest on *their* unsecured money judgment. Here, however, respondents' *non sequitur* produces not literature, but a $55 million legal error.

1. Respondents' concessions essentially mirror Judge McKeown's analysis in dissent below:

> The rule is clear: the Bankruptcy Code prohibits postpetition interest on unsecured claims. 11 U.S.C. § 502(b)(2). The Arizona judgment is an unsecured claim. The interest accrued on the judgment after the filing of the bankruptcy is postpetition interest. What then is the majority's basis for deviating from the rule? [Pet. App. 6a-7a.]

Nothing in respondents' brief provides a convincing answer to this question.

Respondents' theory as to why Section 502(b)(2) does not apply in this case is that "if Petitioners wanted to acquire Respondents' AMERCO stock, they could only do so by complying with the only state law granting them a right to acquire such stock—the Judgment. Even in bankruptcy, one may not acquire new property without paying the seller the amount he is entitled to for the property under state law." Opp. 4. There are only two things wrong with this theory: the facts and the law.

As to the facts: respondents make it seem as if petitioners, after seeking bankruptcy protection, exercised some sort of an option to buy respondents' stock. But that is not at all what happened. The Arizona state court had ruled that respondents could not both accept a money judgment on their claims *and* keep their stock because that would result in a double recovery. *See* Pet. 4.[1] Thus, petitioners were not buying respondents' stock for a fixed price; respondents had to surrender their shares in

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[1] As noted in the petition, the state court's double recovery ruling was not challenged by respondents and is not at issue here. *See* Pet. 4 n.1. Respondents do not contend otherwise in their brief in opposition.

AMERCO if they wanted to secure a money judgment in the amount of $462 million, as it happened. And although the state court awarded respondents interest on the judgment, their right to collect that interest was trumped by Section 502(b)(2). *See, e.g., Bursch* v. *Beardsley & Piper*, 971 F.2d 108, 113-114 (8th Cir. 1992) (applying Section 502(b)(2) to disallow judgment interest) (discussed at Pet. 12-13, 19).

As to the law: respondents assert that "[e]ven in bankruptcy, one may not acquire new property without paying the seller the amount he is entitled to for the property under state law." Opp. 4. But bankruptcy law can have precisely that effect when postpetition interest is involved. In *In re Seal*, 192 B.R. 442 (W.D. Mich. 1996), for example, the debtors had agreed to pay the seller of an automobile 10% interest on the unpaid balance of the purchase price. But the court held that the debtors obtained "free and clear" ownership of the vehicle (*id.* at 458) by paying the principal balance and the interest that accrued prior to bankruptcy but without having to pay any postpetition interest. *See* Pet. 17-18.

Respondents attempt to distinguish *Seal* on the ground that the debtors there "had acquired the vehicle *before* filing bankruptcy" and thus the case "did not involve a debtor's attempt to obtain *new* property in bankruptcy." Opp. 7 (emphasis added). And respondents contend that here "Petitioners could only acquire *new* property in bankruptcy * * * in accordance with state law." Opp. 2 (emphasis in original). But the supposed newness of the stock to petitioners is beside the point. What is relevant under bankruptcy law is that petitioners' obligation to pay judgment interest—like the *Seal* debtors' obligation to pay interest—arose *before* they filed for bankruptcy.

Thus, the interest on the Arizona judgment was subject to Section 502(b)(2) once it became postpetition interest.

2. Respondents attempt to frame the issue in this case as whether the state court judgment should be characterized as "a judicially-mandated sale of stock." Opp. 3. But that characterization of the judgment (found at Pet. App. 25a) blinks reality. To the naked eye—even a legally-trained one—the Arizona judgment appears, as Judge McKeown said, to be nothing more than "a straightforward state court judgment for damages." Pet. App. 6a.[2] But, even more fundamentally, it is totally irrelevant whether the judgment can be seen as "a judicially-mandated sale of stock" because nothing exempts such judgments from the rule against postpetition interest. There is no judicially-mandated-sale-of-stock exception to Section 502(b)(2). *See* Pet. App. 5a (McKeown, J., dissenting) (finding "no magic in the nature of the Arizona judgment that removes it from the general rule disallowing postpetition interest on unsecured claims"). Congress specified the exceptions to Section 502(b)(2), and an exception for judgments involving the sale of stock is not among them. The Ninth Circuit erred in assuming the authority to expand on Congress' design.

3. Respondents intone repeatedly that this case is "unusual" (Opp. 1, 4, 5, 7), as if only run-of-the-mine cases are appropriate for review by this Court. But the pertinent facts are not out of the ordinary. Respondents recovered an unsecured state court money judgment in-

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[2] Respondents tout the fact that "[s]ix of the seven judges who have examined this issue below agreed" with their characterization of the judgment. Opp. 3. But this Court rightly eschews the "judicial headcount" approach to legal analysis. *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 8 n.2 (1989), *overruled on other grounds, Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996).

cluding interest thereon. The only twist is that the judgment also required them to surrender certain stock in order to avoid a double recovery—but that aspect of the judgment is irrelevant to the postpetition interest issue. The most unusual thing about this case is that the Ninth Circuit, in the teeth of Section 502(b)(2), awarded respondents postpetition interest on an unsecured claim. Had the Ninth Circuit denied them postpetition interest, that would have seemed a very routine application of Section 502(b)(2). *See Bursch* v. *Beardsley & Piper, supra*; Pet. 12-13 (citing *Bursch* and other cases denying postpetition interest on judgments). Thus, the facts of this case are not particularly unusual—only the Ninth Circuit's refusal to apply Section 502(b)(2) to those facts is.

4. Respondents claim that "[t]he Ninth Circuit did not create an exception to Section 502(b)(2) here." Opp. 6. But that is not how Judge McKeown saw it, *see* Pet. App. 6a (the majority "creat[es] an unprecedented exception to the rule" against postpetition interest), and there is no other explanation for the Ninth Circuit's decision. Therefore, the decision below conflicts with *In re Fesco Plastics Corp.*, 996 F.2d 152, 156 (7th Cir. 1993), which holds that "[f]or a bankruptcy court to create a new exception [to Section 502(b)(2)] would go beyond [its] authority." *See* Pet. 14-15.

5. Finally, respondents assert that the rule against postpetition interest is "alive and well in the Ninth Circuit" (Opp. 6), but they cite only one Ninth Circuit case decided after the decision below that mentions Section 502(b)(2), and that case, in fact, embraces the view that "postpetition interest on a student loan debt is *nondischargeable.*" *In re Pardee (Great Lakes Higher Educ. Corp.* v. *Pardee)*, —— F.3d ——, 1999 WL 965651, at

*1 n.4 (9th Cir. 1999) (emphasis added). And the particular manner in which the Ninth Circuit elects to apply its newly-minted exception to Section 502(b)(2) is of less concern than the fact that the court has undermined the even-handedness and predictability essential to bankruptcy law by creating an exception in the first place.

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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